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OF THE

SUPREME COURT.

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HENRY J. BEAN.....Associate Justice
GEORGE H. BURNETT.....Associate Justice
HENRY L. BENSON.....Associate Justice
LAWRENCE T. HARRIS.....Associate Justice
CHARLES A. JOHNS.....Associate Justice
ALFRED S. BENNETT.....Associate Justice
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DEPARTMENT NO. 1.

JUSTICE HENRY L. BENSON, Presiding Judge.
JUSTICE LAWRENCE T. HARRIS.
JUSTICE GEORGE H. BURNETT.

DEPARTMENT NO. 2.

JUSTICE HENRY J. BEAN, Presiding Judge.
JUSTICE CHARLES A. JOHNS.
JUSTICE ALFRED S. BENNETT.

THOMAS A. MCBRIDE, Chief Justice.

The Chief Justice, when present, will preside in both departments; in his absence the presiding judge. The Chief Justice at any time may change a justice from one department to the other.

By order of the Chief Justice, a case may be heard by the court sitting *in banc*, either before or after argument. In any case heard before a department, three justices must concur to render a valid judgment.

JUDICIAL DISTRICTS AND CIRCUIT JUDGES

IN THE

STATE OF OREGON

July 1, 1919.

First Judicial District—

Jackson, Josephine — FRANK M. CALKINS, Medford.

Second Judicial District—

Benton, Douglas — JAMES W. HAMILTON, Roseburg.

Curry, Coos — JOHN S. COKE, Marshfield.

Lane, Lincoln — GEORGE F. SKIPWORTH, Eugene.

Third Judicial District—

Linn — PERCY R. KELLY, Department No. 1, Albany.

Marion — GEORGE G. BINGHAM, Department No. 2, Salem.

Fourth Judicial District—

Multnomah —
- JOHN P. KAVANAUGH, Department No. 1, Portland.
- ROBERT G. MORROW, Department No. 2, Portland.
- ROBERT TUCKER, Department No. 3, Portland.
- GEORGE W. STAPLETON, Department No. 4, Portland.
- WILLIAM N. GATENS, Department No. 5, Portland.
- CALVIN U. GANTENBEIN, Department No. 6, Portland.

Fifth Judicial District—

Clackamas — JAMES U. CAMPBELL, Oregon City.

Sixth Judicial District—

Morrow, Umatilla — GILBERT W. PHELPS, Pendleton.

Seventh Judicial District—

Hood River, Wasco — FRED W. WILSON, The Dalles.

Eighth Judicial District—

Baker — GUSTAV ANDERSON, Baker.

Ninth Judicial District—

Grant, Harney, Malheur — DALTON BIGGS, Ontario.

Tenth Judicial District—

Union, Wallowa } JOHN W. KNOWLES, La Grande.

Eleventh Judicial District—

Gilliam, Sherman, Wheeler } DAVID R. PARKER, Condon.

Twelfth Judicial District—

Polk, Yamhill } HARRY H. BELT, Dallas.

Thirteenth Judicial District—

Klamath ..... DELMON V. KUYKENDALL, Klamath Falls.

Fourteenth Judicial District—

Lake ..... L. F. CONN, Lakeview.

Eighteenth Judicial District—

Crook, Deschutes, Jefferson } T. E. J. DUFFEY, Prineville.

Nineteenth Judicial District—

Tillamook, Washington } GEORGE R. BAGLEY, Hillsboro.

Twentieth Judicial District—

Clatsop, Columbia } JAMES A. EAKIN, Astoria.

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

July 1, 1919.

County.	Name.	Official Address.
Baker	Levens, W. S.	Baker
Benton	Clarke, Arthur	Corvallis
Clackamas	Hedges, Gilbert L.	Oregon City
Clatsop	Barratt, Jasper J.	Astoria
Columbia	Metsker, Glen R.	St. Helens
Coos	Hall, John F.	Marshfield
Crook	Wirtz, Willard H.	Prineville
Curry	Buffington, Collier H.	Gold Beach
Deschutes	Moore, Arthur J.	Bend
Douglas	Neuner, George, Jr.	Roseburg
Gilliam	Weinke, T. A.	Condon
Grant	Ashford, Phil.	Canyon City
Harney	Biggs, M. A.	Burns
Hood River	Derby, A. J.	Hood River
Jackson	Roberts, G. M.	Medford
Jefferson	Boylan, Bert C.	Metolius
Josephine	Miller, W. T.	Grants Pass
Klamath	Duncan, William M.	Klamath Falls
Lake	McKinney, T. S.	Silver Lake
Lane	Ray, L. L.	Eugene
Lincoln	Hawkins, Calvin E.	Toledo
Linn	Hill, Gale S.	Albany
Malheur	Swagler, R. W.	Malheur
Marion	Gehlhar, Max	Salem
Morrow	Notson, Samuel E.	Heppner
Multnomah	Evans, Walter H.	Portland
Polk	Piasecki, E. K.	Dallas
Sherman	Huddleston, C. M.	Wasco
Tillamook	Goyne, T. H.	Tillamook
Umatilla	Keator, R. I.	Pendleton
Union	Hodgin, John S.	La Grande
Wallowa	Fairchild, Abijah	Enterprise
Wasco	Galloway, Francis V.	The Dalles
Washington	Tongue, E. B.	Hillsboro
Wheeler	Trill, Wallace G	Fossil
Yamhill	Conner, Roswell L.	McMinnville

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CASES DECIDED

IN THE

SUPREME COURT

OF

OREGON.

Argued March 19, affirmed April 1, 1919.

MEYER *v.* EICHLER.

(179 Pac. 659.)

Partition—Referee—Competency.

1. A defendant in partition suit, alleged to have no right, title, interest, claim or lien to property, or any part thereof, and who made default, was without interest, and his appointment as referee to make partition *held* not erroneous.

Partition—Referees' Oath—Notice of Meeting.

2. Objection urged for the first time on appeal that referees appointed to make partition were not sworn, and that parties were not notified of their meeting, may be dismissed on the ground that the Code does not require any oath or notice of meeting; there being no oath required even under the general provisions of Section 160, L. O. L., et seq.

Appeal and Error—Objections not Urged Below—Consideration.

3. The court on appeal cannot consider objections to majority report of referees, appointed to make partition, not urged before the Circuit Court.

Partition—Unfair Division—Showing—Sufficiency.

4. Majority report of referees *held* not subject to objection that it did not provide for a fair division of the premises sought to be partitioned.

Partition — Decision of Referees—Setting Aside—Displeasure of a Party.

5. Decision of majority of referees appointed to make partition must stand as against the mere displeasure of one of the parties.

Partition—Modifying Report of Referees—Discretion.

6. Circuit Court did not abuse its discretion in declining to adopt defendant's offer to exchange land allotted to him for that allotted to plaintiff and modifying report of referees accordingly, it being contended by defendant's counsel that such change should require plain-

tiff to assume two thirds of mortgage indebtedness upon whole tract, whereas she owes but one third of it.

[As to effect of judgment in partition, see note in 40 Am. Dec. 640.]

Partition—Expenses of Suit—Apportionment.

7. Where costs of partition suit were apportioned in proportion to respective interests of plaintiff and defendant in accordance with Section 483, L. O. L., defendant has no cause to complain of apportionment.

From Benton: JAMES W. HAMILTON, Judge.

Department 1.

This is a suit in partition in which it is agreed that the plaintiff owned one third and the defendant two thirds of a certain tract of land. The contention before us is about the division made by the referees. Among other averments, it was stated:

"That the defendant Ed Davis claims to be a tenant and entitled to possession of a part of said premises; that said Ed Davis has no right, title, interest, claim or lien in or to the said property or any part thereof."

Davis made default. It was suggested in the briefs and at the argument without contradiction that he had only part of the land rented for pasture and had abandoned it.

The court appointed three referees to make partition of the tract. One of them, however, became ill and Davis was appointed in his stead. Having considered the premises, Davis and one of his colleagues joined in a report which, roughly speaking, gave the plaintiff all the land east of the railroad, and the defendant, all west of the railroad. The third referee reported in favor of a different adjustment of the lines. The defendant attacked the majority report on the ground that it did not provide for a fair division of the premises, because he had no notice of the meeting of the referees and for the reason that, as he was advised

and believes, they were influenced by the personal presence, correspondence and persuasion of the plaintiff. He filed in support of his objections the affidavit of the minority referee, his own affidavit and those of two other individuals, giving their opinion that the place was not equitably divided, assigning in the main as reasons therefor that the running water, except a small spring already appropriated by the railroad company, was all on the premises given to the plaintiff and that the most of his land was hilly and intersected with canyons, while hers was level ground. Opposed to this is the affidavit of the plaintiff denying that she had ever undertaken to influence the referees in any way, charging that the minority referee was a partisan in favor of the defendant and setting forth that all the improvements and cultivated land were on the part allotted to the defendant; that there were two springs on his tract, affording ample water supply for all purposes there, and that her lands were covered with brush and second-growth timber while his had a considerable tract of virgin forest. The affidavit of a disinterested party engaged in real estate business owning land adjoining the tract in question and thoroughly familiar with the conditions there, described the land in considerable detail and gave his opinion that the division was fair. The Circuit Court confirmed the majority report and the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. C. T. Haas* and *Mr. Joseph Woerndle,* with an oral argument by *Mr. Haas.*

For respondent there was a brief over the name of *Messrs. McFadden & Clarke,* with an oral argument by *Mr. Arthur Clarke.*

BURNETT, J.—1. There are four assignments of error. Under the first, and in this court for the first time, the defendant challenges the regularity of Davis' appointment. There is no showing made but that he was competent in every respect. It had been averred that he had no interest in the land and he confessed this allegation by his default. Hence, it must be a fact that he was without interest in the matter. The remaining three assignments are to the effect that the Circuit Court erred in confirming the majority report because it is unjust and inequitable; that it was wrong in not adopting the minority report and that further error was committed in assessing costs and disbursements against the defendant.

It was claimed *arguendo* that the first knowledge counsel for the defendant had of the appointment of Davis was when the plaintiff's additional abstract was served; but the very decree appealed from recites that Davis had been duly appointed as referee. The report to which objections were made was signed by him and the supplemental abstract filed by the plaintiff in this court shows that he was appointed. Moreover, no objection was made against the report on this ground in the Circuit Court.

2. It is urged for the first time here that the referees were not sworn and that the parties were not notified of their meeting. These objections may be dismissed on the ground that it is not required by the Code that the referees should take any oath or that notice of their meetings should be given. Even in the general provisions under Section 160 et seq., L. O. L., respecting trial by referees, there is no oath required of them.

It is not assigned as error that the plaintiff attempted to influence the referees. There is no show-

ing of what was done in that respect or that if done it had any effect on their decision. The very argument of the defendant that he had no notice implies the right of parties to be heard before the referees by legitimate discussion or representation. Furthermore, the plaintiff denies in her affidavit that she ever influenced them in any way.

3. We cannot give attention to any of the objections which were not urged before the Circuit Court. That tribunal is the court of original jurisdiction, while this court is only of appellate authority, with exceptions not important here. If a litigant would challenge the result of a decision in the Circuit Court he must show by the record that the judgment of that tribunal was first taken on the questions of which he now complains. The only exception to that rule is that for the first time it may be urged in this court that the complaint does not state facts sufficient to constitute a cause of action or suit or that the trial court had no jurisdiction of the cause.

4, 5. As to the inequality or injustice of the allotment of the referees, there is no showing of any corrupt or fraudulent decision. The utmost that can be said of the affidavits opposed to the report is that the affiants differ in opinion from the majority of the referees. The reasons for their views are very limited and do not, in our judgment, compare with the more comprehensive and unbiased statement given by the real estate dealer whose declaration has already been mentioned. The judgment of someone must prevail and the decision of the referees must stand as against the mere displeasure of one of the parties.

6. The defendant contends that if he had a choice between the two tracts at the same price he would prefer to take the one allotted to the plaintiff, and in his

objections before the Circuit Court he offered to exchange with her and to have the report modified accordingly. We cannot say that the court abused its discretion or authority in declining to adopt this suggestion. We are the less inclined to accept it because at the hearing before us the defendant's counsel contended that such a change should require the plaintiff to assume two thirds of the mortgage indebtedness upon the whole tract, whereas it is admitted that she owes but one third of it.

7. It is the rule declared by Section 483, L. O. L., that "the costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the decree." The expenses of the suit were thus apportioned and the defendant has no cause to complain on that score. The decree of the Circuit Court is affirmed. AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued March 11, affirmed April 1, 1919.

GRAHAM *v.* GRAHAM.

(179 Pac. 661.)

Appeal and Error—Appeal from "Decree by Confession."

1. A decree entered pursuant to stipulation that *pro forma* decree may be entered "without prejudice to either party on the appeal of this case" is not a "decree by confession" within Section 549, L. O. L., authorizing appeals from decrees other than decrees by confession.

Partnership—Accounting—Mistake in Entries of Deceased—Burden of Proof.

2. Plaintiff, administratrix of deceased partner, has the burden of showing mistakes in entries in the handwriting of her deceased husband in partnership records that he kept.

[As to effect of death of one member of a partnership, see notes in 77 Am. Dec. 114; 86 Am. Dec. 600.]

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2.

Alice M. Graham is the surviving widow and sole heir of R. P. Graham, deceased, and administratrix of his estate. The decedent and the defendant A. S. Graham were brothers and entered into an oral agreement of partnership about April 1, 1887. At that time they leased and operated some farming lands in Columbia County, known as the McGuire place. It is conceded that this partnership continued until March 2, 1892, during which time they purchased and farmed that property. On that date the partnership was dissolved and R. P. Graham executed to A. S. Graham a conveyance of all of his interest in the partnership property in Columbia County, for which the latter gave him his promissory note for over $6,000, the agreed value of the then interest of R. P. Graham in the firm.

At the inception of the partnership both of the Grahams were industrious and hard-working and through their joint efforts accumulated property of the reasonable value of about $12,000. While working in a cannery at Astoria R. P. Graham sustained an injury which prevented him from doing manual labor. For the purpose of studying law he entered the law office of the late Justice MOORE at St. Helens, where he remained one year, and then entered the law office of U. S. Grant Marquam, in Portland, where he finished his studies and was admitted to the bar. He later formed a partnership with T. J. Cleeton. During that time A. S. Graham remained in charge of the farm or home place in Columbia County and did outside work in the canneries and logging camps, for which he received good wages. This money, with the proceeds of

the farm, became a part of the assets of the partnership.

It appears from old letters of R. P. Graham to his brother, written between 1887 and 1892, that after he commenced the stuly of law he ceased to be an asset and became a liability of the firm; that he had the usual experience of the young man who studies law and starts out in search of clients, and that it was for such reason that he sold his interest in the property of the firm to his brother. While his testimony is not clear, A. S. Graham contends that at different times between 1892 and 1895 he made various payments on the $6,000 note and that in 1895 there was an unpaid balance of from $2,500 to $3,000 thereon, at which time the brothers had a conference and apparently renewed their mutual relations. The note was then destroyed, but A. S. Graham never reconveyed any interest in the home place to his brother and there is no explanation in the record of any accounting between them as to the amount which A. S. Graham paid on the note. The brothers had numerous mutual dealings and each had absolute confidence in the other. R. P. Graham kept the accounts of the partnership. During this time they bought and sold many pieces of property, involving many thousands of dollars, and as a rule the money passed through the hands of R. P. Graham. A large portion of it represented the earnings of A. S. Graham and the proceeds of the farm and sales of different properties. There is no claim or pretense that after he was admitted to the bar R. P. Graham ever rendered an account of his law business to his brother or that the latter ever shared in that business.

After the death of R. P. Graham on September 28, 1912, Alice M. Graham was appointed administratrix of his estate and brought three different suits: First,

one against A. S. Graham; second, against A. S. Graham et al.; and third, against Anna Breck and A. S. Graham. The main purpose of the first suit was to have an accounting from A. S. Graham, and of the second, known as the "swamp-land case," for an accounting for $20,000 for the sale of over one thousand acres of land by A. S. Graham and others to the Columbia Agricultural Company. This suit was dismissed as to the defendants First National Bank of Astoria and Columbia Agricultural Company. The third suit is known as the "Hanson's Addition" or Breck case, in which the plaintiff claims that she is the sole owner of Lots 5 and 6 in Block 10 of Hanson's Addition to Portland, subject to a mortgage thereon of $5,600. After they were all at issue the three cases were consolidated and tried as one suit, and for the purpose of taking testimony were heard before a referee who made findings of fact and conclusions of law.

The plaintiff and the defendants joined in the abstract of record and the substance of the pleadings only is set out. After the referee made his findings both the plaintiff and the defendants requested modified findings. The consolidated case was submitted to the Circuit Court. It appeared that the trial judge was soon to leave the bench and enter the army. To avoid delay and secure his early decision, the attorneys entered into the following stipulation:

"It is stipulated in open court that a *pro forma* decree may be entered herein by the court, confirming the report of the referee, without prejudice to either party on the appeal of this cause to the Supreme Court."

The referee found in substance, and the court decreed, that the plaintiff is the owner of Lots E, F, 19 and 20 in Block 16 of Alameda Park in Portland, subject to a lien in favor of A. S. Graham for $1,048.89;

that the plaintiff and A. S. Graham are the equitable owners of Lots 5 and 6, Block 10 of Hanson's Addition to Portland, subject to the Annie Breck claim of $5,600 with accrued interest, and that on this claim A. S. Graham should pay the plaintiff $179.22 and account to her for one half of the net rent after February 26, 1917; that A. S. Graham is the owner of the home place in Columbia County; that he is the owner of a $3,400 mortgage on Lot 1, Block 60 in Vernon, in which the plaintiff has an equity of $687; that he is the owner of Lots 47 and 48 of Block 4, Mt. Tabor Place, which plaintiff has an option to purchase within six months, upon payment to A. S. Graham of $467.82; that the latter is the sole owner of Lot 6 and the north half of Lot 5 in Block 28 of Sunnyside; that the plaintiff is the owner of an undivided one-third interest in Lots 8, 9, 14 and 15 in Block 72 of Sellwood; that A. S. Graham owns an undivided one-sixth interest therein; that he is the owner of 60 shares of Alameda Land Company's stock, of the par value of $6,000, which the plaintiff has an option to purchase at any time within six months, at $3,000 with interest at 6 per cent from April 4, 1908; that James Wallace have judgment against the estate of R. P. Graham for $1,165 and interest thereon at 6 per cent per annum since September 28, 1912; that R. D. Kent have judgment against the estate of R. P. Graham for the sum of $1,318.60, with interest thereon from September 28, 1912, at 6 per cent per annum, and that all of the property rights decreed the plaintiff are subject to the debts of the estate of R. P. Graham. The court also decreed mutual setoffs to the amounts thereof, between the above claims of the plaintiff and A. S. Graham. Both parties appealed and the defendants filed a motion to

dismiss the plaintiff's appeal, contending that it is from a decree rendered by confession. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. W. Y. Masters.*

For respondents there was a brief over the names of *Mr. George D. Young, Mr. Horace B. Nicholas, Mr. W. C. Nicholas* and *Mr. R. W. Nicholas,* with oral arguments by *Mr. Young* and *Mr. Horace B. Nicholas.*

JOHNS, J.—Section 549, L. O. L., provides:

"Any party to a judgment or decree other than a judgment or decree given by confession, or for want of an answer, may appeal therefrom. * * "

1. It is very apparent that the stipulation was for the mutual interests of both parties; that it was entered into so that the trial judge could render a decree before he retired from the bench, and that it was intended that either party should have the right of appeal. Under the circumstances, such a decree is not one "by confession" within the meaning of Section 549. There is no merit in the motion to dismiss.

One of the important controversies is over the 1,031 acre tract of swamp-land in Columbia County which was sold to the Columbia Agricultural Company at an agreed price of $20,000, or an average of about $20 per acre. Of this amount, the referee found that Maud Graham and James Wallace furnished 465 acres at a valuation of $5,000; A. S. Graham, 200 acres valued at $4,000; R. D. Kent, 100 acres valued at $2,000; R. P. Graham, 120 acres valued at $600, and A. S. Graham and R. P. Graham jointly, 146 acres valued at $8,400. It is agreed that Maud Graham and James Wallace were to have $5,000 for their 465 acres, but it is con-

tended that the plaintiff is entitled to an undivided one-half interest in the 200 acre tract valued at $4,000; that the 120 acres of R. P. Graham had a much greater value than $600 and that out of the moneys by him received A. S. Graham should pay R. D. Kent one half of the $2,000 for the 100-acre tract. The proceeds of the entire sale were divided as follows: To Maud Graham and James Wallace, 12½ per cent each; to R. P. Graham, 24 per cent; to R. D. Kent, 10 per cent, and the remaining 41 per cent to A. S. Graham. The referee found that including the interest R. P. Graham had collected $13,880 of the purchase price; that A. S. Graham had collected $9,664.16, making a total of $23,544.16; that Maud Graham had received her money in full; that James Wallace had received only $570; that at the time of his death there was due from R. P. Graham to him the sum of $1,165 with interest at 6 per cent from September 28, 1912; that R. D. Kent had never received any of his money and was entitled to $1,388 from the estate of R. P. Graham, less 5 per cent commission, with interest at 6 per cent from the date mentioned, and that A. S. Graham had received all of his money except $568.56, which amount he should also receive from the estate of his brother.

The testimony is not very satisfactory and is somewhat confusing. In a large measure it depends upon the books kept by R. P. Graham and the veracity of A. S. Graham. There was no written partnership agreement. After a careful reading of the voluminous record and an examination of the numerous exhibits, we are convinced that in the main the testimony of A. S. Graham is true as to all of the matters within his personal knowledge. While some of his testimony is not very clear, a large portion of it is his per-

sonal recollection of transactions covering a period of twenty-five years, which would be impossible for anyone correctly to remember or give in detail.

The entire tract was sold on the basis of $20 per acre, out of which Maud Graham and James Wallace were to receive only $5,000 for 465 acres and the testimony shows that the 120-acre tract of R. P. Graham was not worth more than $5 per acre and that the A. S. Graham tract of 200 acres and the R. D. Kent tract of 100 acres were reasonably worth $20 per acre. On such valuations this would leave $8,400 which the Grahams would receive for their 146-acre tract, or approximately $57.50 per acre. This would be a liberal compensation for their services in making the deal.

The following entry appears in the handwriting of R. P. Graham under the A. S. Graham account on page 112 of Ledger number 44 for the year 1899:

"Feby. 11. By Cash on dep. 94 344/04."

The figures "94" refer to page 94 of Blotter number 43 for the same year, where the following entry appears in the handwriting of R. P. Graham:

"11
Cash to A. S. G. 344/04
Cash on deposit & Alaska $18.00 344/04."

This was approximately four years after the $6,000 note was destroyed and would clearly indicate that on February 11, 1899, there was a balance of $344.04 due from R. F. Graham to A. S. Graham.

While it is true that there is some testimony of certain statements of R. P. Graham which would tend to show that he had or claimed some interest in the home place, this is more than offset by the testimony for the defendant A. S. Graham and it is worthy of note that as between A. S. Graham and R. P. Graham there is no testimony in the record which would show that the

latter ever had anything to do with the home place or farm subsequent to 1900; that he claimed any interest in or ever exercised any actual ownership over it, or that after that year he ever kept any "account" of the farm. A. S. Graham testifies:

"It was a mutual understanding between us that I was to have the home place and he was to have his place up here, even before we tried to settle. We had that understanding from the time we started out. We were each to have a home and he put his in his wife's name."

According to the theory of the plaintiff, R. P. Graham and A. S. Graham would have been full partners in all of their business and personal affairs from 1887 until the death of R. P. Graham on September 28, 1912, and each would have shared in all profits and losses, which from necessity would have included the Seaside property and the Irvington residence in the name of the plaintiff, the law business and library of R. P. Graham and the loss of about $5,000 which A. S. Graham sustained in a logging contract. Yet there is nothing in any of the records or account-books kept by either of them which would tend to show that any firm account of such matters was ever kept; that there was ever an adjustment of these affairs between them or that A. S. Graham ever had or claimed any title or interest in the Irvington home, Seaside property, law business or personal holdings of his brother.

The deceased was an attorney by profession and knew the force and effect of the deed which he executed for his interest in the home place to his brother on March 2, 1892. He was ill for some time before he died, yet there is no proof that for twenty years he ever demanded or requested a reconveyance or that he be furnished any evidence of his title. If the home place was the property of the partnership it is not rea-

sonable to believe that A. S. Graham would have the sole and exclusive management of the farm for the last ten years without keeping or rendering a firm account of its expenses and income. Yet there is no evidence that any such account was ever kept or rendered or that any demand was made for a firm account of the farm during the last ten years.

Although there is some evidence that after the death of her husband the plaintiff was told by A. S. Graham that $5,000 should be paid out of the swamp-land deal to Maud Graham and James Wallace, and $7,500 each to A. S. Graham and R. P. Graham, this is flatly denied by A. S. Graham and could not have been so if Kent was to receive $2,000 for his 100 acres, and the testimony is conclusive that Kent was the owner of that land and was to receive the amount mentioned for his interest.

The court should be slow to convey from one claimant to another the record title of lands which as between the living was vested in the survivor for twenty years, on parol testimony only, which is neither clear nor convincing.

2. The remaining questions are largely evidenced by entries in the handwriting of the deceased in the records that he kept, which are explained and corroborated by independent testimony that strongly supports the findings of the referee. It may be that in such a mass of figures covering a period of twenty-five years mistakes were made, but the burden of proof is on the plaintiff. It is very significant that during that long period and in all of their mutual dealings there was never any dispute or controversy between the brothers; that all of the main records of their transactions were kept by the brother now deceased, and that A. S. Graham had but little knowledge of such matters and in a

very large measure was dependent upon the accounts kept by his brother.

After a careful reading of the testimony and an examination of the numerous books, checks and vouchers, we are of the opinion that the plaintiff has failed in her proof and that the findings of the referee are substantially correct. It is contended by the defendants that some slight errors were committed against them by the referee, but, all things considered, the decree of the Circuit Court is affirmed, and neither party is allowed costs in either court. AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued March 12, affirmed April 1, 1919.

ROGERS *v.* WILLS.

(179 Pac. 676.)

Appeal and Error—Review—Contradictory Evidence.

1. Evidence that is contradictory and very evenly balanced will not be reviewed on appeal.

Principal and Agent—Delivery of Deed to Unauthorized Agent—Ratification—Knowledge.

2. That grantees, expecting grantors to execute deed, spoke of property as their own, did not ratify the action of grantors in secretly executing deed and without knowledge of grantees delivering it to real estate agent who negotiated transaction and was not authorized to accept deed.

Brokers—Authority—Acceptance of Deed.

3. Broker, negotiating real estate exchange transaction, was not authorized to accept deed without due authorization by grantees.

Deeds—Delivery to Unauthorized Agent.

4. Delivery of deed to real estate agent who negotiated real estate exchange transaction, who was without authority from grantees to accept deed, did not constitute a delivery to grantees.

Deeds—Delivery—Custody of Agent.

5. Delivery of deed to grantees was a good and complete delivery passing title, which could not revest in grantor by reason of the fact

that grantee immediately surrendered custody of conveyance to agent negotiating transaction as security for his commission.

[As to delivery of deeds, see notes in 16 Am. Dec. 35; 58 Am. Rep. 289; 53 Am. St. Rep. 537.]

Trial—Instruction—Necessity—Action for Breach of Contract.

6. In action for breach of contract to convey, defended on ground that deed had been delivered, court's refusal to instruct that delivery, where in fact made, was not affected by the deed's again coming under control of grantors, was error, where there was evidence that deed which had never been recorded had again come into possession of grantors, since such evidence might lead jury to think the title had remained in grantors.

Trial—Instruction—Necessity—Action for Breach of Contract.

7. Court's refusal to instruct that the delivery of the deed was not affected by the nonrecording of deed or by fact that it was being held by agent as security for payment of commission was for the same reason also error.

Trial—Duty of Court—Instructions.

8. A recent amendment to the Constitution which inhibits the court from passing on the weight of testimony upon a motion for new trial imposes upon the trial court the duty of seeing that the law by which the jury shall measure the facts shall be accurately stated.

New Trial—Grounds—Instructions.

9. Where, in the hurry of a trial, a mistake has been made which might have had an influence upon the verdict, the mistake should be corrected in lower court by granting of a new trial.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 2.

This is an appeal by the plaintiffs from an order of the Circuit Court setting aside a verdict and granting a new trial. Plaintiffs brought an action against defendants for breach of contract to convey certain lots in what is designated as Pinehurst Addition situated in Clackamas County, Oregon. The complaint alleged in substance that plaintiffs entered into a written agreement to exchange Lots "N," "O," and "P" in Block N-3, Rob Roy Subdivision in the City of Portland, for the east one half of Lot 14 in Pinehurst, defendant further agreeing to assume a mortgage of $1,150.00, which was upon the Rob Roy property; that

upon September 30, 1916, plaintiffs made and delivered to defendants a warranty deed to the Rob Roy lots, which defendants accepted and placed upon record, and thereupon took possession of the property, and continued to remain in possession and treat it as their own; that upon the delivery of said deed plaintiffs demanded a conveyance of the Pinehurst property, but that defendants refused to convey the same; that by the terms of the contract said conveyance was to be delivered to plaintiffs at the same time their conveyance of the Rob Roy lots was delivered to defendants, and that by defendants' refusal to convey as aforesaid, plaintiffs are damaged in the sum of $2,500.

A second cause of action set forth substantially the same facts, with the additional allegation that the defendant, Chas. E. Wills, prepared the deed of conveyance, by which plaintiffs conveyed the Rob Roy lots to defendants; that at the time plaintiffs signed said deed they did not notice, and were not aware of the fact, that said deed did not contain a provision whereby said defendants would assume said mortgage, as provided in the contract, and that defendants have refused and still refuse to assume the mortgage, whereby plaintiffs are damaged in the sum of $1,150.

Defendants answered, admitting the execution of the warranty deed by plaintiffs, and denied generally all the other allegations contained in plaintiffs' causes of action.

For a further defense defendants set up substantially the ownership of Chas. E. Wills in the Pinehurst lot, and of the plaintiffs in the Rob Roy lots, and alleged that said lots were subject to a mortgage made to secure a note in favor of D. M. Rinard, due two years after January 25, 1916, with interest at 8 per cent per annum, payable quarterly; that plaintiffs de-

faulted in the quarterly installment of interest on July 26, 1916, and that thereupon the mortgagee elected to foreclose said mortgage, and so notified plaintiffs; that thereupon plaintiffs instructed their duly authorized agent, J. M. Shearer, to effect a sale or exchange of said Rob Roy lots, subject to said mortgage and accrued interest, and that said agent, on September 13, 1916, effected a meeting between plaintiffs and defendant, Chas. E. Wills, and they then and there signed and delivered to said defendant an option, whereby they, in consideration of Wills transferring to them the Pinehurst property, agreed to transfer to him the Rob Roy lots, subject to the $1,150 mortgage and accrued interest; that thereafter defendant Chas. E. Wills elected to and did exercise the terms of said option, and notified plaintiffs to prepare an instrument of conveyance to him, conveying the Rob Roy lots; that plaintiffs notified Chas. E. Wills of their financial inability to have said conveyance prepared, and requested and instructed him to have the same prepared, subject to said mortgage and accrued interest, which he did and sent the conveyance to plaintiffs to be executed; that thereafter on September 16, 1918, defendant made and executed a good and sufficient warranty deed, in favor of plaintiffs, to the Pinehurst property, his wife, Margie M. Wills, joining therein to bar her dower; that defendant Chas. E. Wills delivered said deed to plaintiff, Ella Rogers, who thereupon delivered to him the warranty deed executed by all the plaintiffs; that immediately upon the delivery of the deed by defendants to Ella Rogers, she turned the same over to J. M. Shearer, who, to defendants' best knowledge and belief, is still in possession thereof; that to prevent the threatened foreclosure of the mortgage aforesaid, defendant Chas. E. Wills, assumed the same and payment thereof

with interest, and did pay the interest overdue and has continued to assume said mortgage and to pay said interest, as the same became due, according to its tenor; that the principal is not due and cannot be paid until January 25, 1918; that plaintiffs have, ever since September 30, 1916, by word, act and deed, exercised ownership of said Pinehurst property, holding themselves out as the owners thereof, and admitting the execution and delivery of a deed thereto by defendants to them; that they have suffered no damage; and that defendants are now ready and willing to make a duplicate deed to plaintiffs of said property, if the original is lost or unavailable, if the court shall deem such execution and delivery proper.

There was a reply putting in issue the new matter, and upon the trial there was a verdict in favor of plaintiffs for $1,600 damages.

There was evidence introduced on behalf of the plaintiffs tending to show that no conveyance of the Pinehurst property had been tendered to them; that they had been promised such a deed from time to time, and that they had no knowledge of the execution of such deed and its delivery to Shearer, until Mr. Wills showed them a deed which he had prepared and executed but refused to deliver until plaintiffs had paid certain commission on the sale claimed by Shearer.

On the part of the defendants there was evidence tending to show that defendants had prepared and executed a deed, in accordance with the option, and delivered it to Mrs. Rogers, one of the plaintiffs, who in turn at once delivered it to Shearer, to hold as security for commissions claimed by him as agent for the plaintiffs in negotiating the exchange of properties.

There was a motion for a new trial, which the court granted, assigning as a reason therefor the following alleged errors:

"That there was no evidence in the case on which to base a verdict for that the plaintiffs had accepted and dealt with as their own the property contracted to be exchanged with them by the said defendant, and the plaintiffs had ratified the action of their agents in dealing with said property formerly belonging to defendants as the plaintiffs' own property, and that therefore, the verdict was against the law, and by reason thereof, a motion for nonsuit should have been allowed in the first instance upon motion of attorney for defendants, and a directed verdict in favor of the defendant should have been allowed at the close of the testimony.

"That the court committed error in not giving the following instruction, which was not included either in words or substance in the court's general instructions: 'The court further instructs the jury that if you find delivery of the deed in question has, in fact, been made by defendants to plaintiffs, or their agent, authorized to receive delivery, such delivery, if in fact so made, cannot be affected by the fact that the deed of conveyance might subsequently again come under the control of the grantors, and defendants in this case.'

"That there was evidence in the case to justify the giving of the said instruction.

"That the court committed error in not giving the following instruction, which was not included either in words or substance in the court's general instructions: 'You are further instructed that if you find that delivery of the deed in question was in fact made by defendants to plaintiffs, or their agent, but that said deed was not recorded and was held by said agent or any other person as security, or for any other reason, such nonrecording or agreement to hold said deed, cannot affect said delivery, if in fact made, and you must find for defendants and against plaintiffs.'

"That there was evidence in the case to justify the giving of the said instruction.

"That the court committed error in not giving the following instruction, which was not included either in words or substance in the court's general instruction:

'The court further instructs the jury that if you find that plaintiffs, after the alleged exchange and delivery, treated the Pinehurst acreage property as their own, and voluntarily surrendered their Portland property to defendants, then, in that case, you may take such facts into consideration in determining whether delivery of the deed from the Wills to the Rogers had in fact been made.'

"That there was evidence in the case to justify the giving of the said instructions."

From the order setting aside the verdict and granting a new trial, plaintiff appeals. AFFIRMED.

For appellants there was a brief over the names of *Mr. Samuel B. Lawrence* and *Messrs. Peters & Turner*, with oral arguments by *Mr. Lawrence* and *Mr. R. F. Peters.*

For respondent there was a brief over the names of *Mr. John F. Logan* and *Mr. Walter S. Klein,* with an oral argument by *Mr. Logan.*

McBRIDE, C. J.—1. The evidence in this case is exceedingly contradictory and indicates that the witnesses on one side or the other were guilty of wholesale deliberate perjury. The evidence seems very evenly balanced, and under such circumstances we are not disposed to retry the facts here, as suggested by plaintiffs' counsel.

2–5. There was no error committed by the court in refusing to grant a nonsuit. If, as plaintiffs contend, they expected Wills to comply with his contract, and make and deliver them a deed when his wife had executed it, the fact that based upon such expectations they spoke of the property as their own, would not ratify the action of defendants in secretly making a

conveyance and delivering it to Shearer without plaintiff's knowledge. There was nothing in Shearer's relation to the case in promoting the exchange, which, of itself, would make him the agent of the plaintiffs authorized to accept the deed in their behalf, and such a delivery, without some further authorization by plaintiffs, would not constitute a delivery to them. In fact, the defendant does not claim in his testimony, nor do his witnesses testify, that the deed was delivered by him to Shearer as plaintiffs' agent. On the contrary, defendant claims, and his testimony tends to show, that he delivered the deed to Mrs. Rogers herself, which, if true, was a good and complete delivery passing the title, which could not revest in defendant by reason of the fact that Mrs. Rogers immediately surrendered the custody of the conveyance to Shearer.

The action of the court in overruling defendants' motion for a nonsuit was correct and furnished no ground for setting aside the verdict.

6, 7. The court erred in not giving the first requested instruction quoted in our statement. There was some testimony on the part of plaintiff to the effect that subsequent to the date when Wills claims he delivered the deed to Mrs. Rogers, and to its alleged transfer by her to the possession of Shearer, Mr. Lawrence, acting for plaintiffs, asked to see the deed and that Wills left the room a moment and returned with the deed and handed it to Lawrence. Inasmuch as the deed had never been recorded, a jury of laymen might conclude that even if it had been delivered to Mrs. Rogers, as defendant claimed, and subsequently came back into defendant's possession before being recorded, the title was still in defendants. For the same reason the second request quoted above should have been given and the refusal so to instruct was error.

Neither of the points involved here was sufficiently covered by the general instruction, and the refusal to give these requests would have constituted reversible error on appeal had the judgment been allowed to stand.

8, 9. We are of the opinion the court was justified in granting a new trial. The recent amendment to the Constitution, which inhibits the court from passing on the weight of testimony upon a motion for new trial, imposes upon the trial court the duty of seeing that the law by which the jury shall measure the facts shall be accurately stated, and if, as often happens in the hurry of a trial, a mistake, which might have an influence upon the verdict, has been made, the proper place to correct it and save ultimate needless expense is in the Circuit Court, and the proper method is by granting a new trial.

The order of the Circuit Court is affirmed.

AFFIRMED.

BEAN, JOHNS and BENNETT, JJ., concur.

Argued February 19, affirmed April 8, 1919.

RICHARDSON *v.* POLK COUNTY.

(179 Pac. 664.)

Dedication—Highway—Evidence.

1. Evidence *held* to show that there had been a dedication for the use of the public as a county road of all land between the lines of two old rail fences erected by plaintiffs' predecessor, so that plaintiffs were not entitled to any of the land between such lines.

[As to what amounts to a dedication of a highway, see note in 57 Am. St. Rep. 749.]

From Polk: HARRY H. BELT, Judge.

Department 1.

This suit to quiet title was brought by A. R. Richardson and his wife against Polk County and it involves a road. The first question in dispute is whether the road is a legally existing county road; and if it is, then the next question is whether the line along which the plaintiffs commenced to build a new fence is inside of the road. A patent dated March 18, 1859, was issued to Benjamin F. Burch and his wife Eliza A. Burch for a donation land claim embracing 640 acres. The patent conveyed the south half of the claim to Benjamin F. Burch and the north half to his wife. The road in controversy, which for the sake of convenience we shall call the Burch road, runs across the south half of the donation land claim. The westerly end of the Burch road connects with the main highway, which extends from Independence to Corvallis, at a point where the Independence-Corvallis highway runs north and south. Leaving the Independence-Corvallis highway, the Burch road runs across the Burch donation land claim, a distance of about one half of a mile; and upon leaving the east line of the donation land claim, the road continues onward towards the east for a distance of about four miles to Buena Vista.

In 1912 the plaintiffs purchased from M. M. Diel and her husband a tract of land which lies on the south side of and is adjacent to the Burch road along its entire course as it crosses the donation land claim. The land which the plaintiffs purchased is described in their deed as follows:

"Beginning at a point which is 25.75 chains north and 6.24 chains east of the southwest corner of the Donation Land Claim of B. F. Burch and wife, Not. No. 1520, Claim No. 39, Township 9 South Range 4 West of the Willamette Meridian thence running north 8.03 chains; thence West 7.98 chains; thence

along west line north to the center of the County Road running thence in a southeasterly direction and along the center line of said County Road to a point in the east line of said Burch Claim; thence south 6.89 chains; thence west 24.63 chains to point of beginning, containing 55 acres of land be the same more or less."

The call in the deed which speaks of running from the center of the county road "in a southeasterly direction and along the center line of said county road" refers to the Burch road. Benjamin F. Burch died at some time prior to the trial. The house in which Burch lived is located near to and on the south side of the Burch road at a point about three eighths of a mile east of the place where the westerly end of the Burch road connects with the Independence-Corvallis highway.

There is evidence tending to show that at least some and probably most of the road lying between the east line of the Burch donation land claim and Buena Vista is 40 feet in width "between fences." At some time, probably in 1915, a petition was filed with the County Court asking that the road leading from the Independence-Corvallis highway to Buena Vista be widened to 60 feet throughout its entire length. As a result of the petition and at the instance of the County Court a survey of the road was made in March, 1915, by C. R. Canfield, the county surveyor. Apparently the proceedings to widen the road terminated with the survey, because there is no record of any further steps. When surveying the road Canfield drove a pipe into the ground at a point in the Independence-Corvallis highway where he calculated the center line of the Burch road would, if extended, intersect the center line of the Independence-Corvallis highway. More than twenty years ago a stone was placed in the ground at the east end of the Burch road. The Davidson donation land

claim lies immediately east of the Burch donation land claim; and the northwest corner of the Davidson claim coincides with the inner corner of a re-entering angle on the east side of the Burch donation land claim. The stone, at the east end of the Burch road, marks the location of the inner corner of the re-entering angle in the Burch claim and the northwest corner of the Davidson claim. The course and distance of a straight line run from the pipe in the Independence-Corvallis highway to the stone at the end of the Burch road is south 62° 37′ east 37.07 chains.

In April, 1915, Canfield made a survey of the premises which the plaintiffs had purchased from the Diels. The survey demonstrated that the description contained in the deed embraces only about 44 acres instead of 55 acres of land. There was a rail fence along the south side of the Burch road. Throughout the length of and on each side of this rail fence were trees and much undergrowth. The plaintiffs caused some of these trees to be grubbed out and they cleaned out the undergrowth and removed the rail fence; and afterwards, in 1916, the plaintiffs caused the surveyor to run a straight line from the pipe in the Independence-Corvallis highway to the stone at the end of the Burch road. After running the line from the pipe to the stone the surveyor ran and marked upon the ground a line on the south side of, 20 feet from and parallel with, the first line. The plaintiffs commenced to construct a wire fence along the line which was located 20 feet to the south of the line which connects the pipe and stone. The line upon which the rail fence stood on the south side of the Burch road is throughout its entire length a few feet to the south of the line along which the plaintiffs propose to construct a wire fence; and hence if permitted to complete the wire

fence it will have the effect of narrowing the Burch road. The objections which the county raised to the construction of the proposed fence resulted in this lawsuit. The decree of the Circuit Court was for the county and the plaintiffs appealed. AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Walter C. Winslow.*

For respondents there was a brief and an oral argument by *Mr. E. K. Piasecki,* District Attorney.

HARRIS, J.—1. The plaintiffs disavow any intention to close the Burch road or to prevent the public from using it; but they do contend that the road should be treated as a 40-foot highway with a straight line connecting the pipe and stone as the center line of the road. The county insists that the Burch road is a public highway; that the rail fence which was removed by the plaintiffs marked the south boundary of the road, and that therefore the plaintiffs cannot lawfully build a fence north of the line upon which the old rail fence stood. The county relies upon the doctrine of dedication as well as upon the rule of prescription to establish its contention.

It will be necessary to give a summary of the testimony relating to the Burch road. At some time after locating upon his donation land claim Benjamin F. Burch established a gateway, primarily, we may presume, to enable him to reach the Independence-Corvallis highway and secondarily, we may assume, for the accommodation of his neighbors living east of his premises. After having maintained the gateway for some indefinite period Benjamin F. Burch removed the gates and from that time on there was an open road from the Independence-Corvallis highway to

Buena Vista. When the gates were removed and the road opened to the public there was a rail fence on each side of the Burch road; and both these rail fences had been built by Burch. The rail fences were not absolutely straight and yet each was built on a comparatively straight line and was about as straight as was practicable, considering the surface of the ground and the presence of trees. There is no dispute concerning the location of the rail fence on the south side of the Burch road. The parties are not agreed, however, upon the exact location of the old rail fence on the north side of the road, especially at the east end. At some time, between seven and ten years prior to the trial which occurred in 1917, the rail fence on the north side of the road was removed and a new fence was built. The plaintiffs say that this new fence, especially at the east end, was moved out into the Burch road, at some places 3 or 4 feet and other places 7, 8 and 9 feet. All the witnesses, however, who had personal knowledge of the existence of the rail fence on the north side of the Burch road, testified that the new fence was built on or practically on the line of the old rail fence. It will not be necessary to attempt to decide whether the fence now along the north side of the road does or does not vary from the line of the old rail fence, for the reason that, even according to the contention of the plaintiffs, the variation did not exceed 9 feet at any one place and in the main would probably not be greater than 3 or 4 feet. Assuming without deciding that the present fence along the north side of the road occupies the line of the original rail fence we now turn to a map drawn from measurements made upon the ground. We observe from an inspection of the map that at its west end the Burch road is 66 feet

wide between the lines of the rail fences and at its east end, where it crosses the east line of the Burch donation land claim, the road is 44 feet wide between the lines of the rail fences; and that between its east end and its west end the width of the road varies from 43 feet to 67 feet between the lines of the rail fences.

W. A. Scott, who was 59 years old at the time of the trial, testified that when he was 16 years of age he commenced to work for Burch and that he continued to work for him for about 15 years. Scott says that although he recollects of a gate being there before "he went to work," the road was open when he commenced to work for Burch. According to the testimony of Scott the road was open to the public at least 43 years prior to the date of the trial or at least as early as 1874. Scott also testified that it was his recollection that the road supervisor worked the road nearly every year while the witness was in the employ of Burch. This same witness further stated that "the county overseer ordered him [Burch] to work like they do now" and that he [the witness] as an employee of Burch but under the supervision of the road supervisor worked on this road with a plow and a scraper. According to the testimony of Scott, no attempt was ever made by Burch to interfere with any road supervisor.

M. N. Prather stated that he could "remember distinctly the road was there in 1870"; that he was road supervisor from 1914 to 1916 and that Polk County paid for the work done on the road.

S. H. McElmurray said that he had known the road since 1872 and that it was "open at both ends" when he first saw it; that he was road supervisor in 1876 and 1877; and that while he was such supervisor Burch

"asked me one day if I wouldn't have the road grubbed out there east of his house running down here, I told him I would see the County Court, and whatever they said, if they said grub it out I would do so. So I come down and saw the County Court and they said 'Go ahead and grub it out and grade it up'—it had never been graded, never been graded or nothing. I went and grubbed it out that spring and the next summer, I think it was '77, I graded it too; we didn't have no graders in the county, there wasn't but one or two dump scrapers at the time."

Continuing with his testimony, McElmurray said that the road was first graveled "in '80 some time" and has "been graveled ever since"; that it has been "kept up by the county, the county paid me for what work I did."

Peter Kurre said that he had known the road for about 34 years; that he was road supervisor in 1886 and that he put "the first bridge in there." This witness also testified as follows:

"I have worked on that road, individually myself, for 25 years. I graveled it, I graded it, and I was supervisor on that road for one year. The county paid me for it."

D. P. Stapleton said that he knew that the road had been open for at least 35 years.

Peter Kurre testified that during the last 25 years "the average width of the traveled path of the road" has been "close to 30 or 35 feet"; that the road has "been a splendid road" and that it has "been graded and leveled like an ordinary county road."

J. M. Jones, who has resided in Independence for about 45 years, said that he had known the road "ever since I can remember" and that the average width of the road, including the gravel, the grading and ditches, was about 40 feet.

D. P. Stapleton said that in his opinion the average width of the road, including the ditches, was "possibly 32 or 33 feet."

W. A. Scott stated that "a space of" between 30 and 40 feet "could be used by the public for travel without obstructions."

When asked to state "about how wide is the average traveled portion of the" Burch road, William Addison stated that it was "25 or 30 feet."

The evidence clearly shows an unmistakable intention on the part of Benjamin F. Burch to abandon all the land between the two rail fences to the use of the public as a county road; and consequently there was a common-law dedication of all the land between the lines of the old rail fences: *City of Clatskanie* v. *McDonald,* 85 Or. 670, 674 (167 Pac. 560); *McCoy* v. *Thompson,* 84 Or. 141, 148 (164 Pac. 589). Burch removed the gates so that the public could use the road without hindrance; he built the rail fences for no other conceivable purpose than to confine the travel between the fences; the county accepted the dedication and for more than 30 years has kept the road graded and graveled, and the uncontradicted evidence is that the road compares favorably with the other county roads, including the Independence-Corvallis highway; the record shows that every dollar paid for work upon the road was paid by the county and there is no evidence that any person worked upon the road without pay; the strongest kind of confirmation of the intention of Burch to dedicate the road is found in the fact that he himself recognized that the road was a county road when he caused Scott to work upon it in obedience to the order of the road supervisor. The evidence is of the most convincing character and leaves no room for doubt as to the intention of Burch when

he opened the road to the public: *Harris* v. *St. Helens*, 72 Or. 377, 386 (143 Pac. 941, Ann. Cas. 1916D, 1073). The lines upon which the rail fences stood mark the boundaries of the Burch road. The decree appealed from is affirmed, but without costs to any party in either court. AFFIRMED.

McBRIDE, C. J., and BEAN and BENSON, JJ., concur.

Argued March 26, affirmed April 8, 1919.

SCHWEDLER *v.* FIRST STATE BANK OF GRESHAM.

(179 Pac. 671.)

Fraud—Complaint—Injury to Plaintiff.

1. Complaint in action for fraud *held* demurrable as failing to show injury to plaintiff.

[As to actions to recover for false representations, see note in 18 Am. St. Rep. 555.]

Limitation of Actions—Action for Fraud.

2. An action for fraudulent misrepresentations is governed by the two-year statute of limitations, subdivision 1, Section 8, L. O. L., as to injury to the person or rights of another not arising on contract and not especially enumerated, and not subdivision 4, Section 6, L. O. L., as to actions for injuring personal property.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2.

Plaintiff appeals from a judgment sustaining a demurrer to his complaint. The action is brought to recover damages for fraud and deceit. The substance of the allegations of the complaint is as follows:

After the averment of the incorporation of the defendant State Bank, it is alleged in paragraph II that plaintiff was the owner, subject to a mortgage of

$5,000, of certain real property near Gresham, Oregon, describing the same by metes and bounds.

Paragraph III. That prior to the twenty-fourth day of March, 1914, W. S. Brande was the owner, subject to a mortgage of $16,000, of certain real property particularly describing the same, known as the Cornutt place.

Paragraph IV. That prior to the twenty-fourth day of March, 1914, the defendant, Archie Meyers, was the owner of certain real property, particularly describing the same, containing eighty-five (85) acres, more or less, in Clackamas County, Oregon; and further averred that during all the times mentioned in the complaint, plaintiff was a customer and depositor of the defendant bank, and for a number of years had transacted all his business with the defendant, First State Bank of Gresham; that the defendants were acquainted with his financial condition; that the defendant Archie Meyers was president of the bank, and that plaintiff for a number of years had intrusted his affairs to the defendants and relied upon the honesty and integrity of defendants; that defendants knew that plaintiff's assets consisted of the property described in paragraph II of the complaint, with the stock and chattels thereon, and that the same was mortgaged for the sum of $5,000.

Paragraph VI is as follows:

"That on or about the —— day of February, 1914, for the purpose of inducing the plaintiff to enter into the contract as hereinafter referred to for the purchase of said land described in paragraph III of this complaint, the defendants made to the plaintiff the following representations: That one W. S. Brande, the owner of said property described in paragraph III hereof, desired to sell said property for $21,000.00, and the said Brande would take a mortgage of $14,000.00 for the unpaid balance; that the plaintiff could

secure said property for the sum of $21,000.00, $7,000.00 to be paid in cash and the plaintiff and his wife to make and execute a mortgage of $14,000.00 to one Archelaus Cornutt for the balance of the purchase price of said property, the said mortgage of $14,000.00 to be in two notes, one of $2,000.00, at 5 per cent, payable on or before three years after date, and the second note of $12,000.00, at 5 per cent, payable on or before five years after date, and the said mortgage of $14,000.00 to constitute a first lien on the said property; that the defendants had a purchaser for plaintiff's property; that said purchaser would pay therefor the sum of $33,500, the plaintiff to pay to the defendants the sum of $1,500 as commission; that the defendants knowing the financial condition of the plaintiff and knowing that the only way plaintiff could secure $7,000.00 as the first payment on the property described in paragraph III was to mortgage his home, represented to the plaintiff that they would secure for plaintiff a loan of $7,000.00 to become the first lien on plaintiff's property; that they would pay the $5,000.00 mortgage, then the first lien on plaintiff's property, and that plaintiff was to execute and deliver to the First State Bank of Gresham a second mortgage of $5,000.00 on said property; that the defendants further represented to plaintiff that the mortgage of $14,000.00 to be executed by the plaintiff and his wife as above set forth, would be due on or before three and five years respectively, for the reason that plaintiff would be able to pay said mortgage as soon as the transaction for the purchase of the plaintiff's property was consummated."

In paragraph VII it is alleged that all of said representations were knowingly false and were believed and relied upon by plaintiff, who was induced thereby to enter into the contract thereinafter mentioned, and were made for the purpose of deceiving and defrauding plaintiff.

Paragraph VIII reads thus:

"Contemporaneous with the above mentioned representations, the defendant Archie Meyers negotiated with the said W. S. Brande for the trading of the property described in paragraph III, for 85 acres of land owned by the said Archie Meyers and located in Clackamas county, Oregon, the same being the property described in paragraph IV."

Paragraph IX is as follows:

"That on or about the 16th day of February, 1914, in pursuance to and on account of the said representations and relying upon said representations, the plaintiff instructed the defendants to enter into a contract with the said W. S. Brande on behalf of this plaintiff, wherein and whereby plaintiff agreed to purchase from the said W. S. Brande the property described in paragraph III of this complaint for the sum of $21,000, payable as follows: $7,000 cash and the balance in two notes, one for $2,000, at 5 per cent, interest payable semiannually, payable on or before three years after date, and the second note of $12,000, at 5 per cent, interest payable semiannually, payable on or before five years after date, the said notes were secured by a mortgage in the sum of $14,000, which mortgage was to constitute a first lien on the property described in paragraph III of this complaint; that plaintiff relying upon said representations as aforesaid, further agreed with the defendants that he would sell and instructed the defendants to sell his property to the purchaser had and known by the defendants for the sum of $33,500 and agreed to pay to the defendants as their commission in said transaction the sum of $1,500; that in accordance therewith, on the 18th day of March, 1914, the plaintiff, Ernest Schwedler, and his wife, Helen Schwedler, made, executed and delivered to Charles Johnson their note and mortgage in the sum of $7,000 and which mortgage became a first lien on plaintiff's property; that on the 24th day of March, 1914, the plaintiff and his wife made, executed and delivered to Archelaus Cornutt their notes and mortgage in the sum of $14,000, which mortgage is the first lien on the property described in

paragraph III of plaintiff's complaint, and that on the 24th day of March, 1914, the plaintiff and his wife made, executed and delivered to the First State Bank of Gresham, the defendant herein, their note and mortgage in the sum of $5,000 and which note and mortgage became a second lien on the plaintiff's property; that plaintiff instructed defendants to pay to said W. S. Brande said $7,000."

It is alleged in paragraph X in effect: That the said representations were false and at the time were known by the defendants to be false and fraudulent in the following particulars; that the defendants did not have a purchaser for plaintiff's property; that the said W. S. Brande had not agreed with the defendants to sell his property for $21,000, payable as specified, but, on the contrary, the said W. S. Brande had agreed to trade his equity in said property for the property of Archie Meyers, described in Paragraph IV, in accordance with the written agreement of February, 1914, between defendant Meyers and Brande nor did they ever intend to pay to W. S. Brande, said $7,000, but, on the contrary, the defendants retained and appropriated for their own use and purpose the said $7,000; that Archie Meyers and W. S. Brande consummated their deal and Meyers for the purpose of defrauding plaintiff requested Brande to make the deed to said property to plaintiff which was executed accordingly.

It is then alleged in paragraph XI:

"That as the result of the execution of the mortgages of plaintiff and relying upon the representation of the defendants, the plaintiff herein paid as interest on the $14,000 until the same was foreclosed, the sum of $770; that plaintiff has paid $840 interest on the mortgage of $7,000; that plaintiff has also paid $11 filing fees, $18 court costs in the foreclosure of the $5,000 mortgage, $75 attorneys' fees in said foreclosure, and $150 attorneys' fees for the foreclosure of

the $5,000 and $14,000 mortgages; that plaintiff, in order to pay the interest on said mortgages, had also to borrow the sum of $1,077 at 8 per cent from the 10th day of March, 1915, and has incurred an obligation thereon in the sum of $129.24; also taxes amounting to $109.92."

That by reason thereof, plaintiff has lost and been wrongfully deprived of the sum of $9,103.19, and asks judgment for damages in that sum.

Defendants demurred to the complaint upon the grounds, first, that it did not state facts sufficient to constitute a cause of action; second, that it appears upon the face of the complaint that the action has not been commenced within the time limited by the Code of Oregon. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Frank T. Collier.*

For respondents there was a brief over the names of *Messrs. Snow & Bronaugh* and *Mr. Carl M. Little,* with an oral argument by *Mr. Earl C. Bronaugh.*

BEAN, J.—1. It is not alleged or claimed by plaintiff that the Cornutt place was not purchased in accordance with the instructions of plaintiff, or that plaintiff directed defendant Meyers to purchase the place on the condition that plaintiff could sell his $35,000 farm, or that the place which he purchased was of any less value than the sum paid therefor. The conveyance of the "Cornutt place" to plaintiff was made on or before March 24, 1914. This action was commenced on September 21, 1916. It might fairly be supposed that a $21,000 farm would yield some rent and profit. It does not appear from the complaint that the income therefrom during the time the land was held by plaintiff was insufficient to pay the interest on the

purchase price and the taxes on the real property and all other expenses connected therewith. It is not shown by the complaint that plaintiff was injured in any way by the transfer of the Clackamas County land to Brande by defendant Meyers instead of paying to Brande the $7,000 and then Brande paying to defendant Meyers $7,000, the price of the defendant Meyers' 85-acre tract. It was simply closing two transactions at one time. In the sale of the Cornutt place to plaintiff, he obtained precisely what he bargained for, and for the agreed price. The other alleged fraudulent representation contained in paragraph VI of the complaint is as follows:

"That the defendants had a purchaser for plaintiff's property; that said purchaser would pay therefor the sum of $33,500.00, the plaintiff to pay to the defendants the sum of $1500.00 as commission."

And in paragraph IX of the complaint:

"That plaintiff, relying upon said representations as aforesaid, further agreed with the defendants that he would sell, and instructed the defendants to sell, his property to the purchaser had and known by the defendants for the sum of $33,500.00, and agreed to pay to the defendants as their commission in said transaction the sum of $1500."

It is not shown by the complaint that the defendants represented that they had a purchaser for plaintiff's farm ready at any time to pay $35,000 therefor. The complaint does not indicate when it was expected plaintiff's property would be sold. The fact that plaintiff executed a mortgage for $7,000 upon his property for the purpose of raising money to make the cash payment upon the Cornutt place, and also executed a mortgage for $14,000, $2,000 of which was due on or before three years from that date, and $12,000 on or before five years from that date, shows that he did not expect

that his Gresham property would be sold at that time, as by the sale of his Gresham land, he would have realized money with which to pay the entire purchase price of the Cornutt property. This also indicates that there was no binding contract for the sale of his property. It is not alleged that the defendants, for any consideration, agreed to sell plaintiff's property or in any way guaranteed the making of such sale.

A fair construction of the complaint indicates that the plaintiff undertook to make a larger deal than he was financially able to carry out. It appears that he entered into this transaction a short time before the beginning of the great world war. He does not state that he was unable to make a sale of his property, nor does he show whether or not the conditions of the real estate market changed soon after his purchase was made. It appears to have been a matter of speculation. If within a short time after the purchase of the Cornutt property the market had been such that he could have sold either that property or his Gresham place for an advance of $5,000 or $6,000, he would have had no cause for complaint. The transaction on the part of the defendants as to the purchase of the Cornutt place according to the complaint appears to have been in the nature of advice. Plaintiff does not show any reason why he did not take a chance upon the speculation the same as any purchaser. The complaint does not state a cause of action.

2. As to the second ground of the demurrer, the position of plaintiff is that he could institute the action within six years under the provisions of Section 6, subdivision 4, L. O. L., which enumerates:

"An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof."

The contention of plaintiff is that the fraud was an injury to property.

This is strictly an action for trespass on the case, and not on contract. The time for the commencement of this action is governed by Section 8, subdivision 1, L. O. L., which specifies two years for beginning

"An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not herein especially enumerated."

This was the holding in *Hood* v. *Seachrest*, 89 Or. 457 (174 Pac. 734), an opinion by Mr. Justice Benson, which was an action for fraud and deceit, and it was held to be governed by Section 8, L. O. L. The decision in that case is decisive of this case: See, also, *Smith* v. *Day*, 39 Or. 531 (64 Pac. 812, 65 Pac. 1055); *Dalton* v. *Kelsey*, 58 Or. 244, 250 (114 Pac. 464).

There was no error in sustaining the demurrer to plaintiff's complaint. Therefore, the judgment of the lower court is affirmed. Affirmed.

McBride, C. J., and Johns and Bennett, JJ., concur.

Argued March 20, affirmed April 8, 1919.

In Re WEMPLE'S ESTATE.

JENNINGS *v.* STEARNS.

(179 Pac. 674.)

Limitation of Actions—Suspension of Statute—Absence from State.

1. Where decedent, a resident of Michigan, in April, 1906, in that state, borrowed money from plaintiff, also a resident of Michigan, and plaintiff in August, 1909, demanded payment of the debt in Iowa, and a partial payment was made, and thereafter deceased removed to Oregon in April, 1910, where she resided until her death in September,

1915, plaintiff was not relieved from the effect of the statute of limitations by Section 16, L. O. L., relating to the suspension of the statute by absence from state.

[As to exception in statute of limitations as to time defendant is absent from the state as applicable to nonresidence at time of accrual of action, see note in Ann. Cas. 1912D, 467.]

From Multnomah: EDWIN V. LITTLEFIELD, Judge.

Department 1.

On August 10, 1916, plaintiff presented to the executor of the estate of Alice Edna Wemple, deceased, her claim against the same, for borrowed money, in the sum of $900 with interest thereon. The statement of the claim disclosed upon its face that the money had been borrowed on April 5, 1906, and that a payment of $50 had been made upon the debt, the date of which did not appear therein. The claim was rejected by the executor, as barred by the statute of limitations. Plaintiff then took the proper steps to present the matter to the County Court, where the claim was again rejected upon the same ground. An appeal was then taken to the Circuit Court with a like result, and from the judgment therein, this appeal is taken.

The facts, as disclosed by the record, are substantially as follows: On April 5, 1906, in the State of Michigan, the decedent borrowed from plaintiff the sum of $950, both parties being then residents of Michigan. On August 1, 1909, plaintiff demanded payment of the debt in the State of Iowa, and a payment of $50 was made. The decedent removed from Iowa to Oregon in the month of April, 1910, where she continued to reside until her death, which occurred on September 29, 1915. AFFIRMED.

For appellant there was a brief over the names of *Mr. F. C. Howell* and *Messrs. Wilbur, Spencer & Beckett,* with an oral argument by *Mr. Howell.*

For respondent there was a brief and an oral argument by *Mr. J. O. Stearns, Jr.*

BENSON, J.—The one legal question presented by this appeal is as to whether or not Section 16, L. O. L., relieves the plaintiff from the effect of the statute of limitations. The latest interpretation of Section 16, L. O. L., by this court, is found in the case of *Fargo* v. *Dickover*, 87 Or. 215 (170 Pac. 289), which was decided after the plaintiff herein had filed her brief. We might well rest our conclusion in the present discussion upon the opinion just mentioned, but the ability and force of plaintiff's argument, and the contention that this court has held otherwise in *Jamieson* v. *Potts*, 55 Or. 292 (105 Pac. 93, 25 L. R. A. (N. S.) 24), justifies a serious consideration of the attitude of this court upon the important subject under discussion. It was first presented in the case of *McCormick* v. *Blanchard*, 7 Or. 232. The facts in that litigation were, that in July, 1866, in Chicago, Blanchard executed his promissory note in favor of plaintiff, payable on or before July 1, 1867. A payment was made on November 29, 1871. Defendant moved to Oregon three years before the action was commenced. The conclusion of this court in an opinion written by Mr. Justice Prim is succinctly stated in the syllabus, thus:

"When a debt is contracted in another state by a person who afterwards removes to this state, the statute of limitations begins to run against the debt at the time when the cause of action accrued where the debt was created, and not at the time of the debtor's arrival in this state."

Then came the case of *Crane* v. *Jones*, 24 Or. 419 (33 Pac. 869). Here we find the facts disclosed thus: The defendant, in April, 1879, indorsed a promis-

sory note to plaintiff in Canada, the note being payable one month after date. Shortly after the maturity of the note, defendant removed to Oregon, and for more than nine years was concealed within the state under an assumed name. This court again held that Section 16 does not apply to nonresidents, basing the conclusion upon the authority of *McCormick* v. *Blanchard*, 7 Or. 232, without comment.

Then followed the case of *Van Santvoord* v. *Roethler*, 35 Or. 250 (57 Pac. 628, 76 Am. St. Rep. 472), wherein the plaintiff obtained a judgment against the defendant in territory that is now the State of South Dakota, on March 4, 1886. Defendant left South Dakota in 1890, coming to Oregon, from which state he departed in 1891, residing elsewhere for about three years, and then returned to this state and continued to reside here. When the action was begun here, upon the judgment, more than ten years had elapsed since the rendition of the judgment in South Dakota, and this court, expressly following the cases of *McCormick* v. *Blanchard*, 7 Or. 232, and *Crane* v. *Jones*, 24 Or. 419 (33 Pac. 869), in an opinion by Mr. Chief Justice WOLVERTON, says:

"The appellants question the soundness of these cases, and, while we might be disposed to agree with them were it a matter of first impression, we are now bound by the rule of *stare decisis*. If the practice is to be changed after it has been in vogue for so long a time, it should be by the legislature rather than by the courts."

We come now to a consideration of the case upon which plaintiff relies, *Jamieson* v. *Potts*, 55 Or. 292 (105 Pac. 93, 25 L. R. A. (N. S.) 24). In this case the facts are, that there were two notes sued upon, one being dated November 22, 1891, payable February 15,

1892, and the other dated February 2, 1893, and payable May 1, 1893. At the date of the first note, defendant was in Umatilla County, purchasing cattle, the note being for the purchase price of cattle. Two weeks later he left the state and did not return until January 15, 1893, when he remained for about four weeks, during which time he purchased more cattle, for which he gave the second note in payment. He again left the state and did not again return until a few days before the commencement of the action. The opinion by Mr. Justice Slater, after quoting Section 16, L. O. L., proceeds thus:

"The facts of the present case come within the literal terms of the first clause of this section, for the defendant was out of the state when each of the causes of action accrued, and the term 'any person,' used in the statute, would ordinarily include a nonresident as well as a resident of the state. Defendant was in the state when he executed and delivered each of the notes and a resident thereof. It is therefore a domestic and not a foreign contract. He departed from the state, and after the cause of action accrued, he came again into the state, although for a transient and temporary purpose. It can therefore be said that he 'returned' to the state."

Proceeding, the opinion, after criticising to some extent the logic of *McCormick* v. *Blanchard*, 7 Or. 232, continues thus:

"We are of the opinion, however, that the declaration there made was more comprehensive than was necessary under the facts of that case, and perhaps broader than was intended. Under either view it is not binding upon us as applied to the facts now presented. The opinion in *McCormick* v. *Blanchard*, 7 Or. 232, must be interpreted and controlled by the facts of that case. The cause of action arose in the State of Illinois, between nonresidents of this state. The par-

ties continued to reside there until about three years prior to the commencement of the action, when the debtor of the action, removed to, and thereafter resided in this state."

These excerpts from the opinion disclose quite clearly a purpose, not to overrule the doctrine announced in *McCormick* v. *Blanchard,* 7 Or. 232, but to distinguish it *upon the facts.* It will be observed that the facts in the case at bar are, in effect, identical with those in the case of *McCormick* v. *Blanchard,* 7 Or. 232.

In the case of *Fargo* v. *Dickover,* 87 Or. 215 (170 Pac. 289), this court, after mature consideration, determined to adhere to the doctrine announced in the opinion of *McCormick* v. *Blanchard,* 7 Or. 232. In the opinion, Mr. Justice MCCAMANT, speaking for the court, says:

"We do not think that *Jamieson* v. *Potts,* 55 Or. 292 (105 Pac. 93, 25 L. R. A. (N. S.) 24), should be treated as overruling these cases. The case of *Jamieson* v. *Potts* will be followed whenever a similar state of facts shall arise, but we still hold that Section 16, L. O. L., is without application to a cause of action arising in another state between nonresidents of Oregon."

It follows that the judgment of the lower court must be affirmed, and it is so ordered. AFFIRMED.

MCBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Argued March 14, reversed and dismissed April 8, 1919.

FITZHUGH *v.* MUNNELL.

(179 Pac. 679.)

Fraudulent Conveyances—Bulk Sales Act—Pleading.

1. Since, unless the affidavit prescribed in Section 6069, L. O. L., as amended by Laws of 1913, page 538, is furnished, the statute makes a sale of goods in bulk conclusively fraudulent and void, it is sufficient, for the purpose of defeating such a transfer, to allege the facts bringing the transaction within the statute, without alleging actual fraudulent intent.

Fraudulent Conveyances—Bulk Sales Act—Affidavit.

2. Section 6069, L. O. L., as amended by Laws of 1913, page 538, as to bulk sales, contemplates two classes of creditors, those whose claims are due, and those whose indebtedness is not yet due, but is to become due, and it is imperative that the sworn statement required by the law state the facts as to both classes of creditors, if both exist, and if there are none such, that the latter fact be stated.

[As to remedies of creditor for violation of the bulk sales law, see note in Ann. Cas. 1916C, 928.]

Fraudulent Conveyances—Bulk Sales Act—Innocent Purchaser.

3. Under Section 6069, L. O. L., as amended by Laws of 1913, page 538, as to bulk sales, a buyer is protected in his purchase where the seller has made a statement, under oath, fair upon its face, and the buyer has no knowledge of its correctness and nothing to put him on inquiry about it, but not where the insufficiency of the seller's affidavit is apparent on its face.

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 1.

The plaintiff bought a stock of hardware in bulk from Martin Svarverud, doing business as the Svarverud Hardware Company. Subsequently Munnell & Sherrill, the defendants, obtained judgment on their own and an assigned claim against Svarverud and were about to seize the stock in the hands of the plaintiff on execution, when he brought this suit to enjoin the levy.

The substance of the defense is that Svarverud sold and Fitzhugh bought the stock of hardware in bulk, without executing an affidavit conforming to Section

6069, L. O. L., as amended by Chapter 281, Laws of 1913.

The reply admits the making of the affidavit, the sufficiency of which the defendants challenge, denies any knowledge of the claim of the defendants and contends that the latter knew of the purchase of the stock but gave the plaintiff no notice of their demand. The Circuit Court rendered a decree perpetually enjoining the defendants from seizing the goods by virtue of their execution, and they appeal.

REVERSED. SUIT DISMISSED.

For appellants there was a brief over the names of *Messrs. Cake & Cake* and *Messrs. Potter & Immel,* with an oral argument by *Mr. William M. Cake.*

For respondent there was a brief and an oral argument by *Mr. H. E. Slattery.*

BURNETT, J.—There is but little, if any, dispute about what are deemed to be the material facts in the case. The statute alluded to makes it the duty of the one who purchases merchandise in bulk to demand and receive from the vendor, at least five days before the consummation of the purchase and at least five days before paying the purchase price or any part thereof, "a written statement under oath containing the names and addresses of all of the creditors of said vendor, together with the amounts of indebtedness due or owing, or to become due or owing, by said vendor to each of such creditors and, if there be no such creditors, a written statement under oath to that effect." The enactment requires the seller to furnish such a statement. Other provisions of the act prescribe that the vendee, after having received the sworn statement already

mentioned, shall give notice to the creditors of his intention to purchase.

Under date of December 11, 1916, Sidney Teiser, an attorney of this court, signed and addressed to the plaintiff a letter saying substantially, "following is a list of the names and amounts of the creditors represented by us." Then followed a list of fourteen names of creditor firms with amounts set opposite each name, totaling $6,602.54. The claims of the defendants were not included in the schedule. Appended to this letter was an affidavit signed and verified by the oath of Svarverud, which after the venue runs thus:

"I, M. Svarverud, being first duly sworn, upon oath depose and say: That I am the owner of the Svarverud Hardware Company, which I have sold John R. Fitzhugh of Eugene, Oregon; that to the best of my knowledge and belief the names mentioned in one certain letter hereto attached are a complete list of the creditors and the amounts now due by the said Svarverud Hardware Company; that if any others should be discovered it will be due to the faulty memory or recollection, and I hereby bind myself to make prompt settlement of all such claims chargeable to the said hardware company prior to Dec. 16, 1916, whether mentioned in the attached list or not, and agree to be held responsible to John R. Fitzhugh, of Eugene, Oregon, for any consequences resulting from the failure to bring about such necessary adjustments or payments of said claims."

1, 2. The object of the statute is to protect creditors from fraudulent transfers of stocks of merchandise, thus affording a remedy in addition to the general rules about the transfer of property with intent to defraud creditors. It is not charged in the answer that any of the parties had any intent to swindle or defraud anyone else, and the plaintiff argues that fraud is never presumed but must be pleaded and proved. This con-

tention is not by the mark. Unless the prescribed affidavit is furnished, the statute makes such sales conclusively fraudulent and void and for the purpose of defeating such a transfer of property it is sufficient to allege the facts bringing the transaction within the statute and the law itself will draw the conclusion that a statutory fraud has been committed. Parties engaged in dealings of that sort must know the law and comply with it. Equally will the court take cognizance of the statute and administer it without burdening the pleadings with averments of conclusions which the law already attaches to such sales. The act contemplates two classes of creditors: One whose claims are due, and the other whose indebtedness is not yet due but is yet to become due or owing. It is imperative that both of these classes be treated in the sworn statement according to the facts in both cases, if both exist, or if there are none such, that the latter fact be stated. The affidavit in question is faulty in that it does not give the address of any creditor, and makes no mention of debts to become due or owing, nor does it state that there are no such creditors. This defect is apparent on the face of the instrument and the plaintiff accepted it at his peril. The hedging statement that "if any others should be discovered it will be due to the faulty memory or recollection" was practically sufficient to put the plaintiff upon inquiry with a view to getting the accurate statement contemplated by the statute.

3. There was considerable testimony taken on the subject of whether the plaintiff knew of other claims than those listed. Svarverud as a witness admitted that he was aware he was indebted to the defendants at the time he made the sale, and there is some testimony tending to show that the plaintiff was advised of it also, but he stoutly denies having any knowledge

of the claim of the defendants. In our view of the sufficiency of the affidavit when measured by the statutory standard, it is not necessary to decide whether the plaintiff knew of the defendants' demand or not. There are numerous cases holding that where the vendor has made a statement under oath, fair upon its face, and the vendee has no knowledge of its incorrectness and nothing to put him upon inquiry about it, he is protected in his purchase. This is sound doctrine because if the buyer has acted in good faith and has demanded the sworn statement prescribed by the law he cannot be held for the fraud of someone else. In this instance the decision must turn upon the insufficiency of the affidavit apparent on its face. If the plaintiff chose to take such a defective statement, bolstered up as it was by the seller's collateral promise, he must take the consequences. The law plainly says that a transfer of goods in bulk without the vendee's having demanded and received from the vendor the prescribed affidavit shall be conclusively presumed fraudulent and void as to all creditors of the vendor. No other construction can be placed upon the matter when the statement in question is measured by the statutory standard. A contrary decision would defeat the beneficial purpose of the statute. The decree of the Circuit Court is reversed and one here entered dismissing the suit. REVERSED. SUIT DISMISSED.

MCBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued March 25, affirmed April 8, 1919.

SULLIVAN *v.* MURPHY.

(179 Pac. 680.)

Wills—Validity—Partial Intestacy.

1. It is not essential to the validity of a will that it should dispose of all of the property of the deceased, but a single bequest, however small, would be valid if no other property were disposed of.

Wills—Validity—Revocation.

2. A will would be entirely valid if it effected nothing more than the revocation of a former will.

[As to revocation of wills, see notes in 45 **Am. Rep.** 338; 28 **Am. St. Rep.** 344.]

From Multnomah: ROBERT TUCKER, Judge.

Department 2.

This is a contest brought by the residuary legatee, and principal beneficiary, of a former will, against a later one revoking the first and leaving the deceased intestate as to the property, which had previously been given to the contestant, thereby leaving the same to be distributed among the relatives of the deceased, according to law.

The deceased woman, Bridget Ginty, died on May 26, 1915. On the first day of March, preceding her death, she executed the will under which contestant claims, giving small bequests to some of her relatives, but bequeathing the bulk of her property to Alexander Cestelli, the contestant herein, for charitable purposes.

On the fourteenth day of May, 1915, she executed another will, expressly revoking the former will but making practically the same specific bequests, that she had made in the preceding will, excepting that the bulk of her property, amounting to nearly $20,000, which had been bequeathed in the previous will to Cestelli, was not, in the later will, distributed at all, but left

to descend to her relatives, entitled to inherit under the law.

The later will was admitted to probate as her last will and testament, on July 27, 1915. Afterwards this contest was brought by Cestelli, in the County Court for Multnomah County, and after due proceedings the contest was dismissed and the will sustained. Thereafter, the cause was appealed to the Circuit Court, wherein the will was again sustained. From this decision this appeal is taken.

At the time of her death the deceased was well past middle life, and bordering on old age. Her husband had died many years before, leaving her with two sons, both of whom died a short time before the wills in question were executed; leaving her without any children or lineal descendants. Her nearest, and apparently her only relatives, were a brother and sister and the children of her sister. The deceased was an illiterate woman, unable to read and write, and both of the wills were executed by her mark. AFFIRMED.

For appellant there was a brief over the names of *Mr. M. E. Crumpacker, Mr. Albert B. Ferrera* and *Messrs. Emmons & Webster,* with an oral argument by *Mr. Crumpacker.*

For respondents there was a brief over the names of *Mr. Lawrence A. McNary* and *Mr. Edward H. Cahalin,* with an oral argument by *Mr. McNary.*

BENNETT, J.—It is urged on behalf of appellant that the last will is invalid because, as is alleged, it did not express the real intention of Mrs. Ginty, as to the disposition of the bulk of her property, but left it to be distributed at law, between her brother and sis-

ter. It is claimed she did not wish to have any of the property go to her brother and sister, and that if she had understood that that would be the effect of her last will, she would never have made it.

The evidence is by no means satisfactory or conclusive, as to what her real intention or wishes were in that regard. Father Cestelli was an Italian priest, and the testimony of himself and the two witnesses to the first will, who were procured by him, and who were also Italians, tend to show a very bitter feeling, amounting almost to dislike and hatred, on the part of Mrs. Ginty toward her brother and sister—especially toward the brother. In this the evidence is to some extent corroborated by Mr. Cahalin, the attorney who drew the last will for Mrs. Ginty.

On the other hand, the testimony of Mrs. Ginty's brother and Mrs. Conway and Mrs. Richardson, who were disinterested witnesses, and Father Cronin, a Catholic priest, who frequently visited Mrs. Ginty during this time, was strongly to the effect, that the relations between Mrs. Ginty and her brother and sister were generally warm and kindly—that she and her brother were constantly corresponding through the intermediation of other parties—Mrs. Ginty being unable to write herself—and that her brother, at her urgent request, came up from California to stay with her about the time, or shortly after, the first will was drawn. There is no evidence whatever that she had any unkind feelings toward the children of her sister.

The will was drawn by a reputable attorney, and there is no evidence, nor even a suggestion, that she was not entirely in her right mind, and in possession of all her faculties, at the time the latter will was drawn. Mr. Cahalin, the attorney, had several talks with her about the terms and conditions of the pro-

posed will on several different days, before the will was finally drawn. On the occasion of the first talk with him, Mrs. Ginty expressed herself quite forcibly to the effect that she did not want to give her brother and sister any of her property. This was while her brother was there, and on the day he left to return to his home in San Francisco. After this in the ensuing talks she said nothing in regard to her brother and sister, or as to the disposition of the remainder of her property.

Unfortunately, Mrs. Ginty was addicted to the use of intoxicating liquor; and her troubles and sorrows had, no doubt, made her weaker against temptation than usual, in that respect. It is suggested on the part of the proponents of the will that Father Cestelli had been furnishing her with liquor, upon which she frequently became intoxicated. He admits he gave her liquor at different times during this period, but not in sufficient quantity to produce intoxication. Her brother claims he had remonstrated with her about her habit of drinking to excess, and that this was the reason why she expressed herself to Mr. Cahalin as she did, at the time he first talked with her about the will, and it is contended on the part of proponents that the feeling against her brother and sister, and especially against her brother, was a temporary one, arising on this account, and which had passed away and been dissipated, before the will was finally drawn.

In any event, we cannot believe there is anything in the facts and circumstances surrounding the transaction which would justify a court in setting the will aside. We cannot know, since her lips are closed, what was the motive causing Mrs. Ginty to leave the bulk of her property undisposed of. It seems apparent, from the evidence, that her mind was in a state of uncer-

tainty as to what she should do with the greater part of her belongings. It is plain she was not satisfied with the previous disposition of it, and that, on the other hand, she had not made up her mind to give it to her relatives. It is as likely a theory as any that she was holding the disposition of the remainder of her property in abeyance, until the time when she should make up her mind as to its disposal. She was not a very old woman and could reasonably expect to outlive both her brother and sister, who were much older than she.

Although she was illiterate, the witnesses on both sides agree that she was a very keen, shrewd woman. It is not likely that such a woman could live to her age without knowing that if she died without making any disposition of this property, it would go to her relatives. We must also assume that she understood perfectly that her second will revoked the previous one. Indeed, there is much evidence tending to show, that this was one of the chief motives on her part for making the latter will.

1, 2. Of course it is not necessary, in order to make a will valid, that it should dispose of *all* of the property of the deceased. A single bequest, however small, would be valid if no other property were disposed of. Indeed, there can be no question but what a will simply revoking a previous will would be entirely valid.

It may be that in this case the law will make a different disposition of the bulk of Mrs. Ginty's property than she would have made, if she had made any. As to that we cannot say, and if we could, it would make no difference, for in the absence of a will, or in the absence of the distribution of any particular property by will, it is distributed by law without regard to the wishes of

the deceased. Oftentimes it is disposed of very differently from the wishes of the decedent.

We think the decisions of the County Court and of the Circuit Court were right and must be affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued February 14, affirmed March 18, rehearing denied April 15, 1919.

IN RE DALE'S ESTATE.

TOBIAS *v.* MATHEWS.

(179 Pac. 274.)

Wills—Burden of Proof—Testamentary Capacity.

1. The burden of proving testamentary capacity rests in the first instance upon the proponent.

Wills—Testamentary Capacity—Evidence.

2. Evidence *held* to show that testatrix, 87 years old, was mentally capable of making will.

Wills—Validity—Undue Influence.

3. Daughter, contesting mother's will on the ground that beneficiary and her husband unduly influenced mother by slanderous statements, has burden of proof, which may shift upon proof of confidential relationship and other suspicious circumstances, such as activity of the latter in preparation of will.

Wills—Undue Influence—Presumption.

4. Undue influence is never presumed.

Wills—Undue Influence—Circumstantial Evidence.

5. Circumstantial evidence is often admitted to prove undue influence.

Wills—Undue Influence—Confidential Relations.

6. Confidential relations between testatrix and person charged with having exerted undue influence, though not in itself sufficient to create a presumption of undue influence, is a circumstance which taken in connection with other suspicious circumstances, may justify such an inference of undue influence as to shift burden of proof upon beneficiary.

Wills—Undue Influence—Activity in Preparation of Will.

7. Activity in preparation of will by one who is charged with having exerted undue influence is a suspicious circumstance, which, considered in connection with the fact of confidential relationship between testatrix and such persons, may justify such an inference of undue influence as to shift burden of proof to beneficiary to disprove such influence.

Wills—Will Contest—Evidence.

8. In daughter's contest of mother's will on ground that mother was unduly influenced to disinherit daughter, evidence of conduct of daughter's husband, while daughter and husband were visiting testatrix, was competent to show testatrix's antipathy toward him.

Wills—Undue Influence—Sufficiency of Evidence.

9. In daughter's contest of mother's will, on ground that mother had been unduly influenced, by slanderous statements, to disinherit daughter, evidence *held* insufficient to show undue influence.

[As to unnatural or unjust disposition of estate as evidence of testamentary incapacity, see note in Ann. Cas. 1917E, 1.]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 2.

This is a contest concerning the validity of a will executed by Anna E. Dale, deceased. The probate of the will was contested by Mrs. Mathews, on the ground (1) that the deceased was, at the date of its alleged execution, mentally incapable of making a will and (2) that said instrument was executed under and by reason of the undue influence, importunities, suggestions and persuasions of Mattie M. Tobias, a granddaughter of deceased, and her husband, David S. Tobias.

The matter was heard in probate before Hon. T. J. Cleeton, County Judge of Multnomah County, where a decree and findings were made sustaining the validity of the will and admitting it to probate. The matter was thereupon appealed to the Circuit Court and upon a hearing before Hon. W. N. Gatens, the decree of the County Court was sustained and thereupon contestant appealed to this court.

AFFIRMED.

For appellant there was a brief over the names of *Mr. J. H. Raley, Mr. E. H. Cahalin, Mr. M. H. Clark* and *Mr. B. G. Skulason*, with oral arguments by *Mr. Raley* and *Mr. Cahalin.*

For respondents there was a brief over the name of *Messrs. Wilbur, Spencer & Beckett,* with an oral argument by *Mr. S. C. Spencer.*

McBRIDE, C. J.—While the testimony in this case is voluminous, comprising over eleven hundred pages of manuscript, there is not a single question of law raised which is seriously disputed, the case depending primarily upon what we shall find to be the ultimate facts shown by the testimony and the application of well-known principles of law to such facts.

1, 2. The burden of proof to establish testamentary capacity rests, in the first instance, upon the proponent of the will, and without attempting to discuss the evidence in detail, we think it shows that decedent was mentally capable of making a will.

When this will was executed, she was probably about eighty-seven years of age, and the testimony of numerous witnesses established the fact, that she was a woman of unusual mental vigor for her age. It is a remarkable circumstance that many persons much younger than she seemed to take pleasure in her society and in visiting and conversing with her. She was apparently a favorite in her neighborhood, and those most intimate with her speak in the highest terms of her sweet disposition and general intelligence. She took and read the daily papers, conversed intelligently concerning current events, and her recollection of the early history of Portland, of which city she and her deceased husband

were pioneers, was a source of interest to those concerned with such matters.

In short, we conclude, that while subject to the bodily and mental depreciation that necessarily accompanies old age, it had not affected her faculties to even the extent which one usually expects to find in persons of her age.

Several letters written by her at various dates from January, 1912, to December, 1915, indicate that she was fairly in possession of her faculties and an industrious letter writer, and while there is some evidence to the contrary, the great preponderance of the evidence is to the effect that she maintained her mental capacity up to the time that the will in question was executed and even up to a very few days prior to her death.

The will was drawn by Col. S. C. Spencer, who received his instructions as to how it should be prepared, from Mrs. Dale herself after a long conversation and discussion as to its provisions. Prior to the time he was called upon to draw the will, he had no acquaintance with her, or with any of the parties mentioned in the instrument and therefore, could have had no motive in the matter beyond ascertaining the true intent of the testator and incorporating that intent in the instrument he was called upon to draw. He testifies strongly as to her intelligence and capacity to make a will, and taking this in connection with other testimony, we have no doubt but that at the time she executed the instrument, she knew and realized exactly what she was doing and that the will propounded, expressed the actual wishes of the testatrix as to what disposition should be made of her property after her death.

So far then, as the contention that decedent was mentally incapable of making a will is concerned, we are of the opinion that proponent has shown by the preponderance of the evidence that the testatrix was capable and that the will expressed the state of her mind at the time it was executed.

3. We now come to the second contention of contestant, namely, that such condition of mind was induced by the false and fraudulent statements of Mr. and Mrs. David Tobias and Geo. Tobias, a brother of David, in regard to Mr. Mathews and his wife, Nannie Mathews, whereby the mind of decedent was poisoned against her daughter and her husband to the extent that she was induced to revoke a prior will giving Nannie an equal share of the property and to make the will in question which practically disinherits her. In this contention, contestant has placed upon her the burden of proof in the first instance aided by certain presumptions which we shall hereafter notice.

It may be well in the outset to consider the reasons given by the testator for not making a larger bequest to her daughter, and for making her granddaughter and great granddaughter the principal legatees. The testimony indicates that she had conversed with her son-in-law, David, in regard to making a will. He testifies that she told him that she wanted a will drawn up and that she wanted his wife, Mattie, to have the Thirteenth Street property and his daughter, Helen, to have the Fourteenth Street property, and her daughter, Nannie, to have the Marquam Hill property, and that he remonstrated with her for not giving Nannie more and that substantially the following took place at this interview:

"I said, 'She is your daughter, grandmother, and she has helped some.'

"Grandmother said, 'David, if I give her one of those lots and the property that has got this indebtedness on it—if I give that to Mrs. Mathews, Mr. Mathews can come in and mortgage it, spoil the land and the value of the property and simply ruin it and all that property I worked all those years for—it is mine, I can do as I like with it—it would be gone.'

"She said, 'David, you do not really realize what this property is to me. It is something I have toiled for for many years.' She then said, 'Well, you talk it over with your attorney and explain all about it to him and see what he says.'"

There is no controversy that pursuant to this interview witness had Mr. Haas, his attorney in Seattle, prepare a will by the terms of which among other things, Mrs. Tobias was to receive the Thirteenth Street lot, one of the two valuable lots owned by the testator, in fee—the Fourteenth Street lot, the other valuable lot, was devised to David in trust to collect the rents for a period of five years after testatrix's decease, and to divide the income equally between Mrs. Mathews and Mrs. Tobias, and at the expiration of the five-year period, the property was to be conveyed to Mrs. Mathews, if living, but in case of her death, the property was to be conveyed to Mrs. Tobias.

David Tobias sent his wife to Portland with this draft, which the evidence indicates that Mrs. Dale rejected absolutely, declining to leave any of the property except the comparatively valueless Marquam Hill lots to Mrs. Mathews. As before noted, Col. Spencer, a stranger to all parties, was called in consultation in reference to the preparation of the will and discussed the matter thoroughly with the testatrix, and his account of the interview is substantially as follows:

"A. Well, she told me that she thought she ought to tell me and that there was some friction. She told me about the fact that there was friction between herself

and her daughter and she said that that grew largely out of her dislike for Nannie Mathews' husband, Mr. Mathews, whose first name I do not now recollect.

"Q. Did she make any statements to you regarding Mr. Mathews—Nannie Mathews' husband?

"A. Yes, sir.

"Q. What did she say?

"A. The burden of it was to this effect. He was a sort of a ne'er-do-well and she was afraid that if Nannie Mathews got this property—she explained to me that there were two lots, the Thirteenth and Fourteenth Street lots—there had been erected a building on those two lots and the building on both lots was all one building and she was afraid that if Nannie Mathews got it that through her husband they would lose it and Nannie Mathews would be left without anything and at any rate there would be trouble, and she though that if her granddaughter that is, David S. Tobias' wife, and their child—their little daughter Helen, had it that it would be conserved and she wanted it to go that way and she told me all about how she had worked for it and that she did not want to dissipate it."

In this interview seems to be the secret of the discrimination made by Mrs. Dale against her daughter. She disliked and distrusted her daughter's husband and had a firmly fixed idea that the property would be wasted and encumbered if he was left any opportunity to handle it. She had an old pioneer's pride in arranging her affairs in such a way that this property, earned and kept through years of toil and hardship, should not be squandered or dissipated after her death. Her view of the situation may not have been correct and her method of disposing of the property may not commend itself to the unprejudiced observer.

It does not commend itself wholly to the writer, but it was Mrs. Dale's property and it was her privilege to dispose of it as she thought fit; to give it to her

granddaughter or to charity or to a stranger, unless her disposition of it was brought about by mental incapacity or the fraud and deceit, or undue persuasion of someone to the extent that her normal faculties yielded to the overmastering mind, so that the will would not have been so made but for such fraudulent practice.

This is exactly the contention made by the contestant here. It is claimed that after David S. Tobias became a member of decedent's family by marriage with her granddaughter, he systematically ingratiated himself into the affection and confidence of Mrs. Dale, and by means of slanderous statements and false insinuations against Mr. Mathews and his wife so poisoned her mind against them and aroused her prejudices that she lost her affection for them and for that reason practically disinherited Mrs. Mathews. If this is substantially true and so established, this will ought to be set aside.

4, 5. Undue influence of this character is never presumed but must be proved like any other fact, but as it is frequently incapable of being established by direct testimony, circumstantial evidence is often admitted for that purpose.

6, 7. In considering the question as to whether or not undue influence has been exerted in a particular case, one is naturally led, first, to inquire into the opportunities which the person accused of this species of fraud, had to exert such control over the intention of the testator. Among these is the existence of confidential relations between the testator and the person so charged. While the existence of such a relation will not of itself, according to the weight of authority, create a presumption of undue influence, it is a circumstance which, taken in connection with other suspicious circumstances, may justify such an inference of undue

influence as to put upon a beneficiary the burden of showing, by at least equal evidence and in many jurisdictions, by the preponderance of evidence, that no such influence was exerted. Activity in the preparation of a will, which inures to the benefit or enrichment of the person accused or members of his family, is one of these circumstances.

In the case at bar there is little reliable testimony that Mrs. Tobias ever attempted to exercise any influence over Mrs. Dale to induce her to make the will in question or to make any particular disposition of her property. It is shown that David Tobias stood high in the esteem of his wife's grandmother, that she confided greatly in his business capacity, and had for him apparently all the affection which a mother usually has for a son—an affection which he requited by looking after her business affairs, superintending in a way the erection of a profitable business building upon the lots owned by her, and by constant filial attentions to her material wants.

There is no doubt of her confidence and affection for him, but there is not, in our judgment, sufficient proof to indicate that he abused this affection and confidence, to prejudice her against Mrs. Mathews and her husband. It was general knowledge in the family for years, that Mrs. Dale had executed a will, which practically divided her property equally between her daughter, Mrs. Mathews, and her granddaughter Mrs. Tobias, whom she had partially reared and who was evidently very dear to her. Everybody concerned seemed to acquiesce in this will and to assume that their succession to the estate would follow, according to its provisions, upon Mrs. Dale's death.

Acting upon this presumption, both Mrs. Mathews and Mr. Tobias assisted in protecting the estate dur-

ing the period of Mrs. Dale's poverty, by paying taxes and assisting her in various ways. Upon one occasion, Mr. Mathews bought a building which was situated upon neighboring property, to be moved upon one of the lots and fitted up for rent as a residence, and this at an expense of several hundred dollars to himself, while it added considerably to Mrs. Dale's small income. Until the Mathews went away to Pendleton, there was nothing in the relation of the parties that indicated any particular inharmony between the testator and her daughter, although from declarations made to other parties it appears that Mrs. Dale had a strong objection to certain habits of Mr. Mathews and that these objections were formed largely from personal observation and not from anything told her by David or Mrs. Tobias.

8. Mr. Barrett, who appears to be an intelligent and disinterested witness, testifies that Mrs. Dale told him that when Mr. and Mrs. Mathews were stopping with her, Mr. Mathews would come in, up to as late as 2 and half-past 2 and sometimes 3 o'clock in the morning. That she would sit up there waiting for him to come in. "He was out that late and holding her up from going to bed and breaking her down and making her nervous and she could not stand it much longer." As evidence of the substantive fact that Mathews had such habits as detailed, this testimony would perhaps be incompetent, but as tending to show Mrs. Dale's state of mind and the reasons she gave for her antipathy toward him, it is competent. The reasons she gave for her disapproval are summed up by this witness as follows:

"In her mind he was a saloonman. He was a barber and the best she could figure, he gambled and drank

to extreme and he was not fitted as a man to deal in any respect as to her property and did not come up to her ideal at all as a man."

The fact seems to have been, that he was not particularly thrifty, that he varied the respectable occupation of a barber by occasionally following the vocation of keeper of a pool-hall and bar-keeper in saloons, and that these facts, rather than anything told her by David or Mattie, created in her mind such a distrust that she was unwilling to risk a possible danger that he would waste and dissipate any property she might leave to her daughter.

Her letters indicate that she was quite as well advised of the movements of Mathews and his wife, as were David and Mattie. In her letters she is more frequently giving her granddaughter and her husband news of the doings of her daughter and Mr. Mathews, than inquiring of them in regard to the matter. That she was seriously offended because Mathews had seen fit to take the initiative with Mr. Watkins in regard to the construction of a house on the lots is disclosed in her letters. Probably Mathews did not mean to be officious in the matter, but that he should take it up with Watkins without previous consultation with her evidently offended her. She is not here to give her own side of the controversy, but we have no license to guess that her anger in regard to it was begotten by anything David or his wife injected into it.

Another quarrel in 1914 seems to have brought about a final rupture, and that it is evident that this was not brought about by David or Mattie is shown by Mrs. Dale's letters to them relating the circumstances. The first letter is as follows:

"Portland, Apr. 14, 1914.

"My dear Mattie, David and my little sweetheart:

"I hope in God you are all well and Mattie alright and up I am so tired and nervous I can hardly write. I moved in to my old home in the morning at 9 o'clock and it raining and who do you think was walking in the lot only Tom. I why you are early. What do you want here I was out this way I said its its a long way and raining and Zek told Mrs. Crain not to pay Mrs. Watkins any more rent but to send it to him to Pendleton that he had full control of the place. She told him no Mrs. Dale is my landlady. Why they are the whole talk of the place you ought to hear Patterson. So I hear you are going to build a fine apartment house all modern nothing like it and every one was so glad to see me they surely made me welcome. Guess they sent Tom out to hear the news. Mrs. Patterson says Nany told her she was going to live in 106 but it was rented and she didn't know. She's living out on Gleason I havn't seen her I surely have had it rough this was the dirtiest place but of course I had to move the man was not going to move but Nany told him the place was all going to be torn down and built on or he wouldn't stir.

"Zek told Mrs. Crain he had sold out in Pendleton and he told the women next door if the house wanted fixing to get it done and send the bill to him. Every one says its a good thing Mattie didn't come down for they just wanted her to sign something they had made out. I am going to see the carpenter that had the job. I got the flowers and the cross buns they were nice and the flowers I took to Church. Wish to thank you for No more from Grandma.

"Write soon and tell me how Mattie is getting along."

By "Zek" mentioned in the foregoing letter the writer meant to designate Mr. Mathews. Here we find the decedent giving Mrs. Crain and Mrs. Patterson as authority for the supposed interference of the Mathews in her affairs and telling it as news to Mr. and

Mrs. Tobias. That she resented it very seriously is shown by another letter written a month later, which is as follows:

"Portland, May 14th, 1914.

"My dear Mattie, David and my little sweetheart:

"I hope you are all well I got the package thanks Nany rang the bell and said Halo Mother I never said a word she came in and I said arn't you an awful worm to try to commit forgery if I wanted I could send you and your husband to the pen I told her all the people told me and she denied it she asked me was the place leased I told her she didn't have to know my business I said I guess you are working on your name being in that will that is what I told Watkins when I went after it when he gave it to me I said to him this little piece of paper has made all this work and he said you arn't going to change it I told him he didn't know me yet I told her I didn't wait to take off my things but tore it in pieces and put a match to it. I told her it was where it wouldn't make any more trouble for me. The two houses on 13th St. is gone today the man was taking the windows on 14th away Lauler said not to let them touch a thing I don't see how Nany could say I looked bad don't try to get any one for these rooms has to be fixed she told me she was here to buy furniture and going to live at White Salmon When you come bring what you can spare no matter how old in bed clothes I have the house nice and clean you can see how bad this is wrote its scrawled But its night and I can't see the lines George and Bill was here Sunday.

"Well I must say good-night.

"From Grandma.

"When Mattie is coming you can send a little good whiskey but not with anyone else."

But it is impossible, within any reasonable space, to attempt to trace the cause of the alienation of affection between mother and daughter resulting in the destruction of the old will and the execution of the will

here propounded. There is no reliable testimony which establishes the contention that the change was induced by any fraudulent act of proponents. On the contrary, if Mrs. Dale had been the willing instrument in their hands which contestant would have us believe, she would have executed the will suggested by David and prepared by Mr. Haas, which would have eventually preserved Mrs. Mathews' interest in the property. It was as nearly an approximation to the Watkins will as Mr. and Mrs. Tobias could have hoped Mrs. Dale would execute.

In a fit of resentment, she had destroyed that will which made what would seem to have been a fair distribution, and it was natural that Mrs. Tobias, who seems to have been, in all except that she was a degree in kinship removed, a daughter to the testator, should have some anxiety that she should not die intestate. David, knowing Mrs. Dale's feelings in regard to Mr. Mathews, had prepared a will that there was some hope that she would sign, but with all her amiability, there was a strain of self-will that could not be overcome by persuasion. She knew just what she wanted to do and did it.

Many witnesses were called by the contestant to show that Mrs. Dale was incapable at certain periods to make a will. Some of this testimony is so extravagant that the judge who heard the cause in the first instance evidently did not credit it. He had the advantage of having the witnesses before him and being, thereby, better able to appraise the evidence than we who have only the results in manuscript.

This court has always protected with jealous care the right of persons to dispose by will of that which they have earned by toil. We can only consider the justice or injustice of a will as indicating the mental

condition of the testator. In a large number of will contests which come before us we might, were we dictating such instruments, make a different disposition of the property from that contained in them. But so long as a will is the offspring of the mind of the testator, uninfluenced by disease and untainted by fraud, it must stand, even if its provisions seem harsh.

9. We have carefully considered all the evidence here and are of the opinion that proponents have shown that the will propounded was the intelligent and voluntary act of the testator and was not the offspring of undue influence or fraud.

The decree of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

BEAN, JOHNS and BENNETT, JJ., concur.

Argued March 18, affirmed April 15, 1919.

HIRTZEL *v.* DRAKE.

(179 Pac. 905.)

Equity—Amendment to Conform to Proof.

1. Where, in an action to have a trust declared in land deeded by a parent of the parties to defendant, the trial revealed evidence showing that the deed had never been delivered to defendant, the court properly allowed plaintiffs to amend their complaint to conform with the proof; defendant being granted time to meet the amended pleadings with answers and additional evidence.

Trusts—Trust in Land—Evidence.

2. In an action to have a trust declared in land deeded by a parent of the parties to defendant, evidence *held* sufficient to warrant a finding that the parent and the defendant had agreed that defendant should hold the title as a trustee for the benefit of all his children.

[As to creation of trust in land by parol, see note in 115 Am. St. Rep. 774.]

Deeds—Delivery—Evidence.

3. In an action to annul a deed, evidence *held* sufficient to sustain a finding that the deed had never been delivered.

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 1.

On December 21, 1914, John T. Drake executed a deed purporting to convey a farm, which he owned, to his son John H. Drake. The deed was recorded at the instance of John H. Drake on January 5, 1915. This suit resulted in a decree annulling the deed on the ground that it had never been delivered by the grantor. John H. Drake appealed.

John T. Drake and his wife, Elizabeth Drake, resided on the farm for a period of years until some time in 1914 when marital differences arose between them. The estrangement resulted in a divorce on November 13, 1914. John T. Drake paid $2,000 to Elizabeth Drake in full settlement of her property rights; and he retained the farm. The money used in making this payment was borrowed by John T. Drake and he secured it by mortgaging the farm. There is evidence indicating that John T. Drake was intensely embittered against his once wife. There are five children, of whom four are daughters and one is a son. Lois Hirtzel, Maude M. Pearl and Marguerite Drake, three of the daughters, are the plaintiffs, while John H. Drake, the son, and Goldie Marquam, the other daughter, are the defendants. The daughters, with the exception of Marguerite, are married and have homes of their own; Marguerite was in the hospital a portion of the time and, it may be inferred, was with one of her sisters some of the time; and consequently when his wife left, John T. Drake was alone on the farm. At some time, possibly as early as October, 1914, John T. Drake went to the home of his son, where he lived until the date of his death which occurred on January 4, 1915. Although John T. Drake had been sick and evidently

realized as early as the middle or latter part of November, 1914, that he could not live long, he did not become bedridden until about December 24, 1914.

After the death of their father some of the daughters caused an attempt to be made to persuade John H. Drake to sign a writing containing a declaration that he held the title to the farm in trust for himself and his four sisters equally; but upon his refusal to execute the declaration of trust Lois Hirtzel, Maude M. Pearl and Marguerite Drake, by her guardian, commenced this suit in June, 1915, against John H. Drake and, because their sister Goldie Marquam declined to be a voluntary party to the suit the plaintiffs also made her a defendant. The plaintiffs filed an amended complaint on April 15, 1916. They alleged in this amended complaint that at a time when John T. Drake realized that he was mortally ill and would soon die, John H. Drake and his wife, Orletta Drake, represented to John T. Drake and made him believe that if he died owning the farm his former wife would be enabled to make some demand against it; that it was the desire of John T. Drake to give the farm to his five children equally and that John H. Drake and Orletta Drake represented to him and made him believe that if he conveyed the land directly to the children his former wife, Elizabeth Drake would, as the mother of the minor daughter Marguerite, secure control over that child's interest; that John H. Drake and Orletta Drake represented to John T. Drake and caused him to believe that if he would convey the farm to John H. Drake it would avoid the expense of administering upon the estate and that John H. Drake would hold the land in trust for all the children equally and whenever he could obtain a reasonable price he would sell the farm and after paying

the debts would divide the surplus equally with the daughters; that John H. Drake and Orletta Drake, by making such representations, induced John T. Drake to execute the deed with the agreement, however, that John H. Drake should hold the title in trust for himself and his sisters equally.

Goldie Marquam filed an answer and cross-complaint which admits the allegations contained in the amended complaint of the plaintiffs and then reaffirms all those allegations.

John H. Drake answered the amended complaint of the plaintiffs and the cross-complaint of Goldie Marquam by denying the allegations of trusteeship and alleging absolute ownership in the farm. There were appropriate replies by the plaintiffs and the cross-complainant.

The parties appeared with their witnesses on June 22, 1916, and on that day evidence was introduced in behalf of the sisters as well as for the brother. There was evidence not only tending to sustain the allegations of trusteeship but also tending to show that John T. Drake had never lost dominion over the deed and that the instrument had never been delivered by him. Indeed, substantially all the evidence now relied upon to show nondelivery of the deed was given at that time. The plaintiffs and Goldie Marquam say that they did not know prior to June 22, 1916, that any witnesses would testify that the deed had never been delivered. Because of the evidence relating to the question of the delivery of the deed the plaintiffs asked for permission to file a second amended complaint and Goldie Marquam asked for permission to file an amended answer and cross-complaint; and subsequently on January 2, 1917, the court made an order permitting the amended

pleadings to be filed and allowing John H. Drake ten days within which to answer the amended pleadings.

A second amended complaint was immediately filed by the plaintiffs and at the same time Goldie Marquam filed an amended answer and cross-complaint. Each of these pleadings repeats the allegations which had been made in the first amended complaint and in the original cross-complaint relative to the trusteeship and then it is averred that John H. Drake and John T. Drake agreed that the latter should retain possession of the deed and if he should die owning the land then John H. Drake should take possession of the instrument and hold the title as trustee for himself and his sisters. The second amended complaint, and also the amended cross-complaint, concludes with an alternative prayer asking for a decree annulling the deed on account of nondelivery, or, if it be held that the deed was delivered, that the court adjudge that John H. Drake holds the title in trust for all the parties to the suit. On January 10, 1917, John H. Drake answered the second amended complaint of the plaintiffs and the amended cross-complaint of Goldie Marquam. In addition to admissions and denials John H. Drake reasserted in these answers his claim of absolute ownership.

The parties reassembled in court on March 24, 1917, and John H. Drake again testified in his own behalf and also called several witnesses who gave evidence for him. No additional witnesses were called in behalf of the plaintiffs or the cross-complainant.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Brownell & Sievers,* with an oral argument by *Mr. Charles T. Sievers.*

For respondents there was a brief over the name of *Messrs. Fulton & Bowerman,* with an oral argument by *Mr. Jay Bowerman.*

HARRIS, J.—1, 2. The court properly allowed the plaintiffs and Goldie Marquam to file amended pleadings to conform with the proof of nondelivery. Even though the rights of the parties had been decided on the evidence received on June 22, 1916, and under the pleadings as they were on that date, the evidence and pleadings were nevertheless sufficient to defeat John H. Drake's claim of ownership and to warrant the court in finding that the father and son had agreed that the son should hold the title as a trustee; but in addition to evidence of an agreement of trusteeship the trial revealed evidence showing that the title had not passed to John H. Drake at all, although John T. Drake and John H. Drake had made an agreement providing for a trusteeship on the mistaken assumption that John T. Drake could retain dominion over the deed and if he did not destroy it or did not sell the land the title would, at his death, pass to his son to be held by the latter as trustee. John H. Drake was not misled to his prejudice in maintaining his defense; and, moreover, he was granted and he availed himself of the right to meet the amended pleadings with answers and additional evidence.

3. The trial court found that John T. Drake did not intend to deliver the deed in his lifetime and that he did not deliver it to John H. Drake. This finding is amply supported by the evidence. Declarations made by John T. Drake to different persons prior to December 21, 1914, as to what he intended to do and a statement which he afterwards made as to what he had done; the testimony of the notary public who prepared

the deed and took John T. Drake's acknowledgment of it; the testimony of John H. Drake and his wife; and declarations made by John H. Drake after January 4, 1915, as to what his father had done; all combine to show as convincingly and conclusively as human testimony can show that John T. Drake retained dominion over the deed and did not deliver it.

Mrs. John Jeorg stated that in the fall of 1914 John T. Drake told her "he would sell the place if he could, or deed it to John and then divide it—if John sold the place to divide it equally among the children." Fred Myers testified that John T. Drake contemplated a conveyance to his son and that "the talk he and I had, John was to sell it and then divide it, after he paid off the mortgage." John Jeorg said that he heard John T. Drake say that "he would deed the property to John and he was to pay off the mortgage and divide the money equally among the children." John T. Drake stated to Olof Olsen that "he was going to deed his place to" his son John and that "John is going to sell the place and divide it among the children, to keep down administrator's fees." Besides the testimony of these disinterested witnesses it is recorded in the transcript that Lois Hirtzel told about her father once saying to her "I am going to treat you all the same." In the late summer or fall before his death Goldie Marquam's father said to her "I want to treat you children all alike." L. N. Jones, a friend and neighbor of John T. Drake, saw him three days before his death and at that time, in the language of the witness:

John T. Drake "told me what he had done with his property, and he said he had deeded his property to John—that is, he had deeded it but hadn't given the deed to John, it was in the house, and if he got well he would finish the business himself, but if he died he wanted John to record the deed and finish the business

up. * * He said John was to pay the debts, sell it, and divide it equally among the children."

J. W. Hobart who prepared the deed and before whom John T. Drake acknowledged its execution, testified:

That John T. Drake said that he wanted to make a deed "so as to avoid administration expenses"; he said "he thought he would make a deed to" John H. Drake "and put that deed then in the hands of the cashier of the Bank, * * and in case that he was so that during his lifetime he could sell the property he could destroy it and make a deed direct to the parties to whom he sold it. And in the event he didn't that John could take it then, and that he was to sell the property and pay off the indebtedness and divide the net proceeds equally among the children."

Hobart stated:

That he then informed John T. Drake that the delivery of a deed to a third party "was a sufficient delivery to make it irrevocable"; and that thereupon John T. Drake said "that he did not want it that way, that he would make a deed, though, to John, and put it in a vault in the Bank—rent a vault in the Bank and put it in there so that he could get it out himself and destroy it and make another deed in case he sold the property during his lifetime. And I said to him then * * if you do that and you should die John would have the deed, then have it recorded, his mortgage off, and, says I, it would be his property. 'No,' says he, 'that is not the understanding. The understanding is that he is to sell the property and pay the indebtedness off and divide the proceeds equally among the rest of the children.'"

Continuing with his testimony, Hobart stated that after the deed was signed and witnessed and while John T. Drake had the deed in his hand he (Drake) said to George Thomas, one of the witnesses to the deed:

"George, this is my paper. I am going to put it in the bank so I can get it at any time I choose."

The following is a part of the cross-examination of John H. Drake:

"Q. What did your father say the night Mr. Hobart was there about putting this deed in the bank?

"A. They talked about putting it in there, but anyhow they decided to keep it there; it was his piece of paper and he intended to keep it, and if he sold the property he would tear it up and destroy it.

"Q. You didn't get hold of the deed and record it till after he died?

"A. No, sir.

"Q. He still had it until he died?

"A. Yes, sir."

Orletta Drake admitted that John T. Drake "was trying to sell his farm all the time he was alive" and that if he could have made a sale "he would have signed the deed"; that, referring to the deed after its execution, he said, "This is my paper, and in case I die it is John's" and "if he lived he would take the deed and tear it up and use the money for his own benefit."

In February, 1915, John H. Drake went to the office of F. M. Brooks for the purpose of paying a bill incurred in caring for Marguerite during an attack of typhoid fever. The following excerpt from the testimony of F. M. Brooks is significant:

"He asked me to reduce my bill as much as possible; that the father had deeded him property, the place—it was deeded to him and he intended to sell it as soon as possible and after it was sold he intended to divide the money equally among the children, his included, and I made a reduction on the bill at that time because of that."

Maude M. Pearl, Lois Hirtzel and Goldie Marquam all say that a few days or weeks after the funeral they met with their brother and he told them at that time that the farm had been deeded to him to save expense of administration and that "he was to have the personal property for taking care of" his father.

The deed was placed in the library table in the house of John H. Drake instead of being deposited in the bank. The instrument was executed in the home of John H. Drake while John T. Drake was living there. The act of placing the deed in the library table was described by Orletta Drake as follows:

"After he signed the deed and they were all gone Mr. Drake sealed it up in an envelope and he said, 'I will give it to you to put away,' and I said, 'I will put it in the library table,' and he said, 'All right.' It was there till after he died."

Referring to the circumstance of the deed being placed in the library table, John H. Drake said his father asked Orletta Drake "where he should put it. She took the deed and he went with her and they put it in there and he knew right where it was and it stayed there until he died." The record contains the following questions by the court and answers by the defendant John H. Drake:

"Court: And when it was in that library table could he go and get it at any time he wanted to?

"A. Yes, sir: it was right there. He went with my wife when they put it in there, and he could have had it any time he wanted it.

"Court: That is the way you understood it at the time he put it in there?

"A. Yes, sir: that is the way I understand it. He said 'If anything happens to me that deed is to be recorded immediately.' He said 'If I die this is yours.'

"Court: That is, if he died?

"A. Yes, sir.

"Court: In the meantime he said it was his until he did die?

"A. Yes, sir.

"Court: You are quite sure there is no mistake about that?

"A. Yes, sir; I am sure there is no mistake about that."

When testifying at the second hearing on March 24, 1917, John H. Drake claimed that his father gave him the deed on December 24, 1914, and requested that he record the instrument; that the witness gave the deed to his father-in-law who kept it "a week or ten days" and then took the paper on January 5, 1915, to the county recorder's office for recording. It will be recalled, however, that on June 22, 1916, when telling about the deed having been placed in the library table, John H. Drake said that the paper "stayed there until he [John T. Drake] died"; and it will also be remembered that Orletta Drake testified that "it was there till after he died."

The decree appealed from is affirmed. AFFIRMED.

McBRIDE, C. J., and BURNETT and BENSON, JJ., concur.

Argued March 27, affirmed April 15, 1919.

CASH v. PORTLAND RY. L. & P. CO.

(179 Pac. 909.)

Appeal and Error—Review—Findings of Court.

1. Findings of court which tried a case without a jury on appeal must be deemed and treated as the verdict of a jury.

Principal and Agent—Authority to Compromise and Make Settlement.

2. An agreement between an electric light and power company's customer and her agent that the agent was to check up and audit

customer's bills for light and power between certain dates, for which services the agent was to be paid 50 per cent of all money returned or credited to her account by reason of errors or overcharges, *held* to give the agent power to agree with the company as to the amount it should repay the customer on account of errors and overcharges and to include authority to make settlement.

[As to general rules controlling the authority of agents, see note in 16 Am. St. Rep. 493.]

Electricity—Overcharge—Treble Damages—"Person Injured"—Compromise.

3. Within Public Utilities Act, Sections 67 and 75, authorizing recovery of treble damages by "person injured" for overcharge by public utility, customer of light and power company was not "injured" where customer contracted with an agent for discovering overcharges, and agent made a settlement, as authorized to do, for the amount of overcharge discovered.

Words and Phrases—"Refund."

4. "Refund" means to give back, to repay, to restore, to supply again with funds, to reimburse, to return in payment or compensation for what has been taken, or the repayment or return of money.

From Multnomah: ROBERT TUCKER, Judge.

Department 2.

This is an action against the defendant, a public service corporation, to recover treble damages under section 67 of the Public Utilities Act (Laws 1911, Chap. 279, page 483), which was tried before the Circuit Court without a jury, resulting in numerous findings of fact based upon which judgment was rendered in favor of the defendant.

The plaintiff as the operator of a hotel on Salmon Street in Portland entered into a lighting contract with the defendant on September 19, 1913, for the period of one year, and on the same day, for the same period, entered into another contract for electric power to operate the elevator in the hotel. Separate connections were made and electric current was furnished through separate meters. On September 26, 1914, new and distinct lighting and power contracts were executed and remained in force until July 31, 1916, when a

single contract embracing both light and power was executed. On November 29, 1913, the defendant filed its tariff sheet with the then Railroad Commission of Oregon, in which was a "combined light and power schedule" which provided that where the light furnished to a customer using both light and power service did not exceed 50 per cent of the total, the power rate only should be applied to the combined light and power charges. This schedule was in effect until July 17, 1916. Between November 29, 1913, and July 17, 1916, the lighting demand of the plaintiff did not exceed 50 per cent of combined light and power used by her, and under such tariff provision she was entitled to the combined light and power rate. Nevertheless, separate charges were made for the light and power consumed, as a result of which during that period she was overcharged and overpaid the defendant the sum of $143.23.

For several years J. M. Trobert was an employee of the defendant and on March 5, 1917, while then out of its employ, he entered into a contract with the plaintiff to check and audit the bills which had been rendered her by the defendant between the dates mentioned, for which service he was to receive 50 per cent of any money returned to the plaintiff on account of overcharge. He applied to the defendant and was given free access to its books and records and was accorded every facility for investigation, as a result of which it was found that the defendant had overcharged the plaintiff $143.23. On May 29, 1917, the defendant issued its voucher in favor of the plaintiff for that amount and about that date delivered it to Trobert as her agent. The plaintiff has ever since retained and now has the voucher.

On August 2, 1917, this action was commenced to procure a judgment for three times the amount of the overcharge, Trobert's expenses, the sum of $100 as attorneys' fee, and costs. The plaintiff relies upon section 67 of the Public Utilities Act for her right to maintain the action.

The defendant in its answer admitted the filing of the schedule, pleaded the execution of written contracts and averred that the plaintiff voluntarily made her payments; that it had a large number of customers under such schedule; that "through error and inadvertence and without any willfulness, wantonness or evil design on its part" the defendant failed to notice that the plaintiff's installation and demand were such as to entitle her to the combined light and power schedule; that the defendant "voluntarily and prior to the commencement of this action repaid to plaintiff as a full and complete settlement, all sums charged plaintiff and paid by her under said combined light and power schedule, and by reason thereof plaintiff sustained no damage as a result of defendant's action," and that "said defendant in said entire matter acted honestly and in good faith, without intention of injuring plaintiff, or of violating said Public Utilities Act."

A reply was filed and testimony was taken. The trial court found that there was an overcharge in manner and form as claimed by the defendant, made findings of fact as to an agreement upon the amount of the overcharge and the payment thereof and rendered judgment in favor of the defendant, from which the plaintiff appeals, contending that under such findings of the trial court she is entitled to judgment for treble damages as prayed for in her complaint. There is no allegation of fraud or of any effort on the part of the defendant to conceal the overcharge, or that the officers

of the defendant had any knowledge thereof, except in so far as it appears on the account-books of the corporation. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. J. G. Arnold.*

For respondent there was a brief over the name of *Messrs. Griffith, Leiter & Allen,* with an oral argument by *Mr. Rufus A. Leiter.*

JOHNS, J.—1. The case was tried without a jury. The testimony is not before this court. There is no question about any of the findings made by the trial court and it is elementary that they must be deemed and treated as the verdict of a jury.

2–4. The plaintiff claims three times the amount of the overcharge of $143.23, three times $71.62, which she had agreed to pay Trobert for his services, making a total of $644.55, together with $100 as attorneys' fee, and costs. There is no dispute as to the amount of the overcharge. That was agreed upon after the investigation was made. The plaintiff bases her claim upon section 67 of the Public Utilities Act, which is as follows:

"If any public utility shall do or cause to be done or permit to be done any matter, act or thing in this act prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, such public utility shall be liable to the person, firm or corporation injured thereby in treble the amount of damages sustained in consequence of such violation, together with a reasonable counsel's or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case; *provided,* that any recovery as in this section provided shall in no manner effect (affect)

recovery by the State of the penalty prescribed for such violation."

It appears from the findings that on March 5, 1917, the plaintiff entered into a written agreement with J. M. Trobert, a late employee of the defendant, by which he was to check and audit all bills rendered or charges made against the plaintiff for electric light and power furnished from November 29, 1913, to May 15, 1916, for which services the plaintiff was to pay him 50 per cent of all money returned to her or credited to her account by reason of any errors or overcharges. Finding number 11 is as follows:

"That thereafter said J. M. Trobert requested defendant to check and audit plaintiff's account with defendant, and said J. M. Trobert and defendant, by one of its employees, jointly investigated into said account and the basis of charges thereof, and it was agreed between said J. M. Trobert, as plaintiff's agent, and said defendant that an improper application of the tariff rate had been made in the bills rendered to and paid by plaintiff, by reason whereof plaintiff was entitled to a refund from defendant in the sum of $143.23; that no demand was then, or at any time, made by plaintiff or by her agent, J. M. Trobert, upon the defendant for the payment of any other or different sum from the sum of $143.23, except as contained in the complaint filed in this action."

From number 12 it appears that on May 29, 1917, the defendant issued its voucher in favor of the plaintiff for $143.23 and delivered it to her agent, J. M. Trobert. "as a full and complete settlement of all sums charged plaintiff and paid by her in excess of the sums proper to be charged plaintiff and paid by her under said combined light and power schedule aforesaid, and of plaintiff's claim against defendant." Finding 13 reads thus:

"That this action was instituted on or about August 2, 1917. That plaintiff held said voucher from on or about May 29, 1917, without presenting the same to the bank upon which it was drawn, for payment, and without notifying defendant that the amount thereof was unsatisfactory or insufficient, or that she would not accept or receive the same in full settlement of her claim against defendant, until after the commencement of this action, and after the filing of defendant's answer herein, when on August 24, 1917, plaintiff's attorney by letter advised defendant that said voucher had not been cashed by her and would not be cashed because she did not feel that it was the full amount due her; that she had not accepted such sum and would not accept such sum in full payment of her claim against defendant; that the voucher had been held since it was sent to her, and would be held without any presentment for payment."

Under his contract Trobert was to receive one half of all moneys which he collected from the defendant, and had authority from the plaintiff to ascertain and determine the amount of any errors or overcharges. The authority to determine this amount and collect it and to retain one half thereof when so collected, for his services, carried with it the power to agree with the defendant as to the amount which it should repay to the plaintiff on account of such errors and overcharges and would include the authority to make a settlement. It appears from finding number 11 that Trobert, as agent of the plaintiff, agreed with defendant that "an improper application of the tariff rate had been made in the bills rendered to and paid by plaintiff," and that by reason thereof "plaintiff was entitled to a refund from defendant in the sum of $143.23." Webster defines the word "refund" thus: "to give back, to repay, to restore, to supply again with funds, reimburse." In the Century Dictionary the word is

defined as follows: "to return in payment or compensation for what has been taken, repay, restore; repayment, return of money." Hence, under such findings it was agreed by the plaintiff, through Trobert, her authorized agent, and the defendant that the plaintiff should have and the defendant should "return in payment or compensation for what had been taken," "repay" or "restore" $143.23. Prior to the commencement of this action no demand was made for any other or different sum, and it appears from finding number 12 that the voucher was issued "as a full and complete settlement of all sums charged the plaintiff and paid by her in excess of the sums proper to be charged plaintiff," and that she has ever since held and now retains the voucher.

Construing the findings of fact, the plaintiff through her agent agreed with the defendant upon the amount which was due and owing to the plaintiff on account of errors and overcharges and that the defendant should return "in payment or compensation" therefor, "give back" or "repay" the sum of $143.23, and pursuant to such agreement the defendant issued and delivered its voucher for that amount to the plaintiff, which she received and retained for more than two months without any notice, protest or objection. Based upon that agreement, plaintiff claimed, more than two months after the voucher was delivered, that she was entitled to recover triple the amount which she, through her agent, agreed should be repaid by the defendant.

Section 67 of the Public Utilities Act provides that "such public utility shall be liable to the person, firm or corporation injured thereby, in treble the amount of damages sustained in consequence of such violation," etc. How can the plaintiff consistently claim or assert that she was "injured thereby" when, through her

agent, she agreed upon the amount which was to be returned to her "in payment or compensation for what had been taken" on account of the errors or overcharges? Section 75 of the act has the following heading: "Substantial compliance with act sufficient; technical omissions immaterial; liberal construction." This title is made a part of the Section and as to its meaning should be construed with it. The Section says:

"The provisions of this act shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."

Applying such provisions to the findings, we do not know upon what theory the plaintiff is now entitled to recover as damages treble the amount which she agreed should be returned "in payment or compensation for what had been taken."

Based upon the record, we hold that there was a full and complete settlement between the plaintiff and the defendant and that the voucher is and was intended to be a payment in full of the amount found due and owing from the defendant to the plaintiff. The judgment is affirmed. AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued April 8, affirmed April 15, 1919.

ZUCKERMAN *v.* SANITARIUM CO.

(179 Pac. 911.)

Courts—State Courts—Jurisdiction.

1. A state court has jurisdiction of an action for false imprisonment against a sanitarium to which plaintiff was alleged to have been illegally committed as insane by a United States territorial court or officer.

Evidence—Judicial Notice—Alaska.

2. Judicial notice will be taken of fact that Alaska is a part of United States and that, under Act Cong. Feb. 6, 1909, Secretary of the Interior was authorized to make a contract with a private sanitarium company for the care of persons adjudged insane in such territory.

False Imprisonment—Confinement of One Adjudged Insane.

3. It appearing that trial and commitment of plaintiff as an insane person were before and by court having jurisdiction of subject matter and of person of plaintiff, she cannot recover damages for false imprisonment from a sanitarium to which she was legally committed.

[As to what amounts to false imprisonment, see note in 118 Am. St. Rep. 719.]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 2.

While the plaintiff was a resident of Alaska, in the vicinity of Iditarod, insanity proceedings were instituted against her in the probate court for Otter Precinct, Territory of Alaska, Fourth Division, based upon which her case was brought before that court and "at a trial by jury" she appeared in person and by two attorneys appointed by the court to represent her. After the hearing the jury returned a verdict to the effect that "the said Sandford Zuckerman is really and truly insane and that she ought to be committed to the asylum or sanitarium provided for the care and keeping of the insane for the District of Alaska, and the said finding of the jury having been approved by the commissioner," it was decreed by the court that she

was "really and truly insane" and "that she be committed to the asylum or sanitarium provided for the care and keeping of the insane for the District of Alaska." On July 7, 1911, the court issued its warrant and commitment to the United States marshal for that judicial division of the Territory of Alaska, by which that officer was directed to deliver the plaintiff to the asylum provided, "to be thereafter properly and safely kept until discharged therefrom, and she is in the meantime committed to" the custody of the marshal.

Alleging that on July 7, 1911, she was, over her objections, protests and remonstrances, "tried and committed to the institute for feeble-minded from Otter Precinct, District Number four of the Territory of Alaska"; that she was delivered to the institute of the defendants on September 8, 1911, and that she was then "in good and perfect health and mind and was conscious of the acts and deeds of the defendants in placing her in said institute"; that she protested against being placed and confined therein and deprived of her liberty, and that she was seriously and permanently injured in her physical health and suffered mental anguish by reason of which she sustained special damages in the sum of $4,093 and general damages in the sum of $20,000, she commenced this action against the defendants.

The Sanitarium Company, the Sanitarium Association and Henry Waldo Coe answered, admitting the existence of the corporations as alleged; that the Sanitarium Company operated the Morningside Hospital; that it received compensation for care and attention given to patients and that Dr. Coe was the president and manager of the Sanitarium Company. As a further and separate answer it is alleged that on March

19, 1914, acting through the Interior Department and pursuant to an act of Congress, the United States entered into a contract with the Sanitarium Company by which that defendant, for an agreed compensation, undertook to receive and give medical treatment to any individuals adjudged insane in the territory of Alaska delivered to that defendant by the proper officers of the United States, for a period of five years from January 16, 1915; that by said contract the defendant was required to keep safely and exercise extraordinary care to prevent escape of any insane patient committed to its keeping by the United States, and to "keep any such person in custody until the said defendant and its officers, and the agents of the United States government shall, in the exercise of their judgment and discretion, determine that any such person may be safely discharged from custody," and that the defendant was required to and did execute a penal bond in the sum of $5,000 for the faithful performance of the contract. The defendants then aver the insanity proceedings against the plaintiff in the probate court of Alaska, the hearing thereon, the verdict of the jury and the order of the court adjudging the plaintiff insane, the issue of the warrant to the marshal and the delivery of the plaintiff to the Sanitarium Company, and attaches as exhibits duly certified copies of such proceedings. The answer further pleads that the plaintiff was held in custody by the defendants by virtue of said warrant and under the terms and provisions of the contract with the United States.

In her reply the plaintiff denies "each and every allegation" of the further and separate answer, but there is no averment or proof that the committing court did not have jurisdiction of the plaintiff or the subject matter. On such issues a trial was had on January 16,

1917, and a verdict was returned in favor of the plaintiff in the sum of $2,500. The court set aside the verdict and granted a new trial. On April 25, 1917, the case was again heard and after the testimony was all taken the defendants filed a motion to dismiss, "on the ground that it conclusively appears that the plaintiff, while in the territory of Alaska, was legally adjudged insane, and as a ward of the federal government was detained by an agent of the Interior Department," and for the further reasons that "this is an action for false imprisonment and cannot be maintained for the reason that it appears that the plaintiff was adjudged insane and was committed and held pursuant to such judgment and commitment," and that "neither said judgment nor commitment was ever at any time set aside or modified and at no time thereafter was application made by the plaintiff to any court or tribunal to have determined her mental condition or her right to discharge." After argument the court sustained the motion to dismiss, "for want of jurisdiction of this court to hear and determine said cause for the reason that said cause of action should be had and maintained in the federal court and not in a state court"; and that "this court has no jurisdiction in the matters herein," and rendered judgment for costs in favor of the defendants, from which ruling the plaintiff prosecutes this appeal. AFFIRMED.

For appellant there was a brief over the names of *Mr. Elton Watkins* and *Messrs. Winter, Reames & Maguire,* with an oral argument by *Mr. Watkins.*

For respondents there was a brief over the names of *Mr. Malcolm H. Clark* and *Mr. Alfred E. Clark,* with an oral argument by *Mr. Malcolm H. Clark.*

JOHNS, J.—1. While it is true that the court dismissed the action for "want of jurisdiction * * to hear and determine the said cause for the reason that the said cause of action should be had and maintained in the federal court and not in a state court," and that such ruling was a technical error, the true reason was correctly given in the following statement which the court made to the jury:

"Upon the theory upon which this case was tried, it would be necessary in order for plaintiff to recover to prove that the plaintiff was never legally adjudged insane, and that there was never any legal warrant issued for her commitment. In other words, that her imprisonment was not a result of judicial proceedings. Now it clearly appears that her arrest, trial, judgment of insanity and commitment were all legal and regular in a court of competent jurisdiction and pursuant to the acts of Congress. The proceedings of that court have never been reversed or modified, and I am compelled to hold as a matter of law that these proceedings are without defect and are legal and regular in every respect. This being the situation, she was legally arrested, taken into custody and delivered into the custody of the defendant, at the Morningside Hospital, the institution designated by the United States government for the care of the Alaska insane, and therefore her imprisonment was not false, the theory upon which this case was tried."

It appears from the record that a complaint was filed against the plaintiff here in a court of general jurisdiction, charging her with insanity, whereupon she was apprehended and tried by a jury. After an investigation and trial, at which she was represented by counsel appointed by the court, the jury found that the plaintiff was "really and truly insane" and that she ought to be committed to an asylum. This finding was approved by the commissioner or trial court and a war-

rant and commitment were issued and delivered to the United States marshal, directing him to deliver the plaintiff safely to the asylum. It further appears that the defendant the Sanitarium Company, of Portland, Oregon, had a valid contract with the United States to care for and to "exercise extraordinary care to prevent the escape from said defendant of any such insane patient committed by the United States to its care and keeping" until such time as its officers and agents should, "in the exercise of their judgment and discretion, determine that any such person may safely be discharged from custody." Under this commitment and by virtue of the contract mentioned, the plaintiff was delivered to the Sanitarium Company. The judgment has never been vacated or set aside and has at all times been, and is now, in force and effect. There is no proof or allegation of fraud, and the plaintiff does not question the jurisdiction of the court which adjudged her insane.

2, 3. This court should take judicial notice of the fact that Alaska is a part of the United States and that under Act Cong. Feb. 6, 1909, Chap. 80 (35 Stat. 601) the Secretary of the Interior was authorized to make the contract with the Sanitarium Company as alleged in the answer. By the Compiled Statutes of Alaska for 1913, pages 52–56, jurisdiction of insanity proceedings is conferred upon a United States commissioner and *ex-officio* probate judge. It appears from the record that the trial and commitment were before and by a court which had jurisdiction of the subject matter and of the person of the plaintiff; that such jurisdiction is not questioned and that no attempt has ever been made to vacate or set aside the judgment of the Alaska court. For such reasons this court must

assume that they were valid and were made by a court of competent jurisdiction.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued April 1, affirmed April 15, 1919.

MEISTER v. GENERAL ACCIDENT CORP.

(179 Pac. 913.)

Insurance—Accident Insurance.

1. If a man deliberately assaults another with a lethal weapon in his hand, such as a pistol, whether it be loaded or not, it cannot be said that the injuries he receives in the resulting struggle are accidentally received within terms of insurance policy.

[As to right to recover under accident insurance policy for injuries received while fighting, see note in **Ann. Cas. 1916C, 579.**]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

This is an action wherein the plaintiff seeks to recover upon an accident insurance policy, for the death of her husband, who was shot and killed by one Emil Spranger. The sole issue developed by the pleadings is as to whether the death was caused by accident. The complaint, upon this subject, follows the language of the contract of insurance, and reads thus:

"That the said Henry Meister, deceased, met with his death on March 4, 1917, and that said death was caused directly, solely and independently of all other causes, by external, violent and accidental means, and was not caused wholly or in part, directly or indirectly by any disease, defect or infirmity on the part of said

Henry Meister, deceased, nor was said death caused through suicide."

The answer denies this allegation and pleads affirmatively that at the time of the homicide, the plaintiff and her husband, and Spranger were all residents of the same apartment house; that on that day the deceased, in a fit of anger, went to the basement and procured a gun with which he proceeded to Spranger's apartment, where, with the pistol in his hand, he assaulted Spranger, who drew a gun and shot Meister, causing his death. It is then alleged that Meister's death was the natural and probable consequence of his assault upon Spranger, and was not the result of any accident.

This is denied in the reply. A trial being had, at the close of plaintiff's case, defendant moved for a judgment of nonsuit, which was granted, and plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. C. T. Haas.*

For respondent there was a brief over the name of *Messrs. Wilbur, Spencer & Beckett,* with an oral argument by *Mr. Ralph W. Wilbur.*

BENSON, J.—The contention of appellant is, that there is evidence in the record which would justify the submission of the case to the jury upon the issue as to whether or not the death was accidental. The evidence is brief, consisting of the testimony of the plaintiff herself, and the policy of insurance. The plaintiff testified simply that the deceased was her husband; that on March 4, 1917, Spranger shot him with a revolver; that he died from the wound so inflicted, and

that she is the beneficiary named in the contract of insurance; that on the afternoon of the day when the shooting occurred, she and her husband had been playing cards with Spranger in his apartment; that they later adjourned to Meister's apartment where they had dinner, or a lunch; that thereafter Meister said that he must attend some sort of a meeting, and went away; that Mrs. Meister and Spranger then returned to his apartment and resumed the card-playing; that at about 9:30 P. M. Meister returned, and knocked at Spranger's door, which was opened by Mrs. Meister, who found her husband in a mood so angry that he struck her, and then proceeded to the basement, where he procured a pistol and with it in his hand, went to Spranger's apartment, and assaulted the latter, who in the scuffle which ensued, shot and killed Meister. Spranger had not, prior to the affray, displayed any weapon, and the evidence does not disclose any knowledge upon the part of Meister, that Spranger was armed. This is practically all of the evidence. Does this evidence make a case sufficient to go to the jury upon the question as to whether or not the death was caused by accidental means? We have been unable to find any case in which this court has answered the query. The authorities in other jurisdictions are conflicting. In the case of *Fidelity & Casualty Co. of New York* v. *Stacey's Exrs.*, 143 Fed. 271 (74 C. C. A. 409, 6 Ann. Cas. 955), 5 L. R. A. (N. S.) 657), the policy insured the deceased "against disability or death resulting directly, and independently of all other causes, from bodily injuries sustained through external, violent and accidental means, (suicide, sane or insane, not included)." The insured engaged in a heated discussion with another man, who called him a liar, whereupon he struck the man two blows in the face, one with each fist, and in

so doing he received a cut or abrasion of the skin upon his knuckle. Blood-poisoning ensued, and in a few weeks he died from its effects. The United States Circuit Court of Appeals, speaking by Judge PRITCHARD, says:

"It thus appears that the insured, at a time when he was in full possession of his mental faculties, accosted Porter and engaged in a controversy in consequence of which he committed an assault on the body of Porter, evidently for the purpose of punishing him for what had just occurred between them. Everything connected with the transaction clearly indicates that the insured intended to do exactly what he did on that occasion. Therefore the injury which he received at the time was the natural and logical result of an intentional act on his part. He was a man of intelligence, and it must be presumed that he knew that in making an assault with his fist in the manner described he would probably sustain more or less injury to himself."

Consequently it was held that the trial court should have directed a verdict for the defendant.

Hutton v. *States Accident Ins. Co.*, 267 Ill. 267 (108 N. E. 296, Ann. Cas. 1911C, 577, L. R. A. 1915E, 127), was a case in which the plaintiff saw a man with whom he had had a dispute, sitting on a stool at a lunch counter. Without saying a word, he walked up behind the man and struck him a blow on the side of the head, intending, as he says, "to hit him so hard that he wouldn't get up and begin it all over." The other man, however, knocked the plaintiff down, and in some manner his leg was broken. The Supreme Court of Illinois held that the trial court should have directed a verdict for the defendant, for the reason that the injury was not the result of accident, citing *Fidelity & Casualty Co. of New York* v. *Stacey's Exrs.*, 143 Fed. 271 (74 C. C. A. 409, 6 Ann. Cas. 955, 5 L. R. A. (N. S.)

657), and *Taliaferro* v. *Travelers' Protective Assn.*, 80 Fed. 368 (25 C. C. A. 494), and saying:

"Where one voluntarily and deliberately engages in a fight or brawl, and places another in a position where he, too, must fight to defend himself, it is a natural result, and one known to all sensible men as likely to follow, that one or both of the combatants will receive more or less serious injury."

Taliaferro v. *Travelers' Protective Assn. of America*, 80 Fed. 368 (25 C. C. A. 494), is a leading case upon the subject, and was an action to recover upon an accident policy. The facts, as gleaned from the opinion, were as follows: Taliaferro, the insured, and one Frith were standing in front of the latter's gate, talking. The conversation grew loud and angry in its tone and Taliaferro was heard to say that "he must have revenge; put yourself in shape." Then Frith took off his coat, throwing it upon the fence, and immediately thereafter, Taliaferro drew a pistol, rushed upon Frith and struck him in the face with the gun, and Frith then drew his pistol and shot Taliaferro, who died as a result of the wounds thus received. The trial court directed a verdict for the defendant, which was approved by the Supreme Court, which says:

"From the inception of the difficulty, the deceased appears to have been the aggressor. He was the first to draw a deadly weapon, accompanying that action with the exclamation that 'he must have revenge; put yourself in shape.' This can be regarded in no other light than an invitation to a deadly encounter, in which the deceased voluntarily put his life at stake, and deliberately took the chances of getting killed. Where a person thus invites another to a deady encounter, and does so voluntarily, his death, if he sustains a mortal wound, cannot be regarded as accidental by any definition of that term which has heretofore been adopted."

The opinion cites and distinguishes the case of *Lovelace* v. *Travelers' Protective Assn.*, 126 Mo. 104 (28 S. W. 877, 47 Am. St. Rep. 638, 30 L. R. A. 209), which is the leading case apparently in conflict with the views expressed in the foregoing quotation.

In *Price* v. *Occidental Life Ins. Co.*, 169 Cal. 800 (147 Pac. 1175), a case was presented upon findings of fact, in which the details of the affray do not appear. The policy was in substantially the same form as that of the case at bar, and the court, sitting *in banc*, says:

"If it should appear that the killing had been the result of an encounter with deadly weapons, and that the deceased had himself invited and brought on such conflict, the fatal result would not have been accidental, so far as he was concerned."

The opinion quotes with approval from *Taliaferro* v. *Travelers' Protective Assn.*, 80 Fed. 368 (25 C. C. A. 494), and distinguishes *Lovelace* v. *Travelers' Protective Assn.*, 126 Mo. 104 (28 S. W. 877, 47 Am. St. Rep. 638, 30 L. R. A. 209), in these words:

"There the deceased had engaged in a quarrel, in the course of which he was killed, but it did not appear that he drew a weapon, or that he knew his opponent was armed."

The plaintiff in the case at bar contends that where the evidence discloses that the deceased was ignorant of the fact that his adversary was armed, the fatal result was accidental so far as it concerned him. In support of this position, he relies principally upon the case of *Lovelace* v. *Travelers' Protective Assn.*, already mentioned, and *Union Casualty Co.* v. *Harroll*, 98 Tenn. 591 (40 S. W. 1080, 60 Am. St. Rep. 873).

The facts of the Lovelace case are these: His contract of insurance promised indemnity for "death by accident." He was a commercial traveler, and on the

occasion of the alleged accident he came as a guest to the hotel where it occurred. He was a friend of the proprietor, who was sick that night, and no one was in charge of the office. A man named Graves was in the office, cursing and boisterous. Lovelace remonstrated with him, and an altercation ensued in which Graves challenged Lovelace to eject him, whereupon Lovelace slapped Graves and pushed him back until the latter struck the door, which was closed. Graves then drew a pistol and shot Lovelace, who died from the wounds inflicted. The opinion concludes thus:

"Whether he acted lawfully as a guest of the hotel, during the absence and illness of the proprietor, in attempting to remove Graves from the hotel office by force, we think needless to investigate. It may be assumed that, by his course of conduct, he voluntarily assumed the risks of a fight. But there is nothing in the circumstances to show that he voluntarily assumed the risk of death. We consider his killing an 'accident' in the popular and ordinary sense in which that word is generally used."

We are unable to agree with the eminent jurists who undertake to distinguish this case from the Taliaferro case upon the ground that Lovelace did not know his adversary was armed, nor do we think that anything in the opinion justifies the inference that such fact was a controlling factor. On the contrary we think the logic of the learned justice is based upon the fact that Lovelace himself was unarmed, or at least, did not exhibit any weapon, and therefore did not invite that *species* of combat. This theory is strengthened by the fact in the Taliaferro case, that Taliaferro could not have known that Frith was armed when the assault was made, for the latter did not draw his gun until after he had been struck in the face with the revolver of his enemy.

In the case of *Union Casualty Co.* v. *Harroll,* 98 Tenn. 591 (40 S. W. 1080, 60 Am. St. Rep. 873), the deceased was himself unarmed, and also ignorant of the fact that his antagonist had a pistol upon his person, upon these facts, and following the authority of the Lovelace case, the Supreme Court of Tennessee held that the death was accidental within the meaning of the terms used in the insurance contract.

It is not necessary, in this case, for us to determine whether or not, under any circumstances, the injuries sustained by the aggressor should be regarded as other than accidental, but we think it very clear that if a man deliberately assaults another, with a lethal weapon in his hand, such as a pistol, whether it be loaded or not, it cannot be said that the injuries he receives in the resulting struggle are accidentally received. The very act of assaulting another with a gun is an invitation to that other to resist unto death, and if the aggressor is killed, it is a natural and logical sequence of his own voluntary act.

The judgment of the lower court is affirmed.

AFFIRMED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Argued March 19, affirmed April 15, 1919.

COLWELL *v.* COLWELL.

(179 Pac. 916.)

Bills and Notes—Presentment of Check—Reasonable Time—Question for Court.

1. Where the facts are admitted or conclusively established, question whether check was presented within a reasonable time is one of law to be decided by the court.

Bills and Notes—Checks—Presentment—Reasonable Time.

2. Where a check was delivered and accepted in the city where the drawee bank was situated, reasonable time for presentment expired at the close of the next business day.

Limitation of Actions—Checks.

3. Where a check was delivered and accepted in the city where the drawee bank was situated, the statute of limitations started to run at the close of the next business day in favor of the drawer of the check, although check was not presented to drawee bank until later, despite Section 6019, L. O. L., providing that drawer of check will be discharged from liability to the extent of loss occasioned by not presenting the check within reasonable time.

Bills and Notes—Rights of Payee—Necessity for Presentment.

4. Before an action can be maintained against a drawer upon a check, demand for its payment must be made from the drawee bank.

[As to burden of proof of loss by reason of delay in presenting check for payment, see note in Ann. Cas. 1913A, 1293.]

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 1.

The principal allegations of the complaint are here set down:

"That on or about the 14th day of March, A. D. 1907, the defendant made his check in writing, dated on the said 14th day of March, 1907, payable to the order of the plaintiff herein, and delivered the same to this plaintiff, which said check is in words and figures following, to wit:

" 'No. 680 Portland, Ore., March 14, 1907.

" 'MERCHANTS NATIONAL BANK
of Portland, Oregon.

" 'Pay to E. K. Colwell or order $1500.00 Fifteen hundred Dollars.

" '(Signed) GEO. L. COLWELL.'

"That said check was presented for payment on the 20th day of February, 1917, to the said Merchants' National Bank of Portland, Oregon, now doing business under the name of the Northwestern National Bank of Portland, Oregon, and payment of the same was refused, and the same was not paid, and the said defendant refused to honor or pay the same."

In addition thereto it is said that due notice of the dishonor of the check was given to the defendant; that it has not been paid and that the face thereof is due to the plaintiff. The court sustained the following demurrer to the complaint, that it does not state facts sufficient to constitute a cause of action against the defendant and that the action has not been commenced within the time limited by the laws of the State of Oregon. From the ensuing judgment the plaintiff appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. Frank T. Collier* and *Mr. James L. Hope,* with an oral argument by *Mr. Collier.*

For respondent there was a brief over the name of *Messrs. Fulton & Bowerman,* with an oral argument by *Mr. Jay Bowerman.*

BURNETT, J.—It will be observed that the check was presented for payment nine years, eleven months and six days after its delivery to the payee. It was made in Portland, Oregon, and directed to a bank in the same city. Under these circumstances this court has laid down the rule in *Matlock* v. *Scheuerman,* 51 Or. 49 (93 Pac. 823, 17 L. R. A. (N. S.) 747, and note), thus:

"What is a reasonable time has been fixed by judicial decisions. As between the drawer and payee the rule is that, when the payee to whom the check is delivered receives it in the same place where the bank on which it is drawn is located, he may preserve recourse against the drawer by presenting it for payment at any time before the close of banking hours on the next day": citing 2 Daniel, Neg. Inst. (5 ed.), Section 1090.

A check is an instrument designed for use presently and not for a permanent investment. If A owes B a sum of money, the latter must commence his action within six years; but if A gives his check to B, this does not alter the circumstances in that respect beyond the requirement that the holder of the check must present it within a reasonable time. The statute declares that except upon a judgment or a sealed instrument an action must be commenced within six years upon "a contract or liability express or implied": Section 6, L. O. L.

This provision is for the benefit of the drawer as well as of any other party to a check. The instrument is one upon which a possible action may be founded. If the holder would avail himself of the benefit of the contract embodied in it, or if he would enforce his remedy upon it, he is bound to act within the period limited by law. An act necessary in this behalf is a presentment of the check to the bank upon which it was drawn. The law says this must be done in a reasonable time. Condensed from a note to *Aymar* v. *Beers*, 7 Cow. (N. Y.) 705 (17 Am. Dec. 538), which treats of the subject of reasonable time in relation to bills and notes, we find the following in 3 R. C. L. 1194:

"When an act is required or permitted to be done within a reasonable time, it has been the cause of much perplexity to the courts to determine whether the question, 'What is a reasonable time?' is one of law or one of fact. Undoubtedly it is highly desirable that the court should decide the question as one of law, where it can be done without trenching upon the province of the jury in determining mere matters of fact, in order to secure uniformity and certainty in the adjudication of causes. The great difficulty is that this question is generally found so complicated with the peculiar facts of each case that it is often impossible to separate it, and so, from necessity, the whole matter is left to the

jury. Where, however, from the simple, clear, and undisputed state of the facts, or from the similarity of the case to others which have been decided, the court can determine the question as it does other legal questions, by the application of settled principles and general and uniform rules, it ought to do so. But whenever the special facts and circumstances are such that the court cannot, by the aid of any legal rule or principle, decide upon the legal quality of the facts, it is necessary that the jury should draw the inference in fact, with reference to the ordinary course and practice of dealing, and the general principles of morality and utility. Where the law itself prescribes what shall be considered to be reasonable time in respect to a given subject, the question is one of law, and the duty of the jury is confined to finding the simple facts. Where, on the other hand, the law does not, by the operation of any principle or established rule, decide upon the legal quality of the simple facts, or *res gestae,* it is for the jury to draw the general inference of reasonable or unreasonable in point of fact. In such cases, the legal conclusion follows the inference of facts; in other words, the question as to reasonable time, etc., is one of fact, and the time is reasonable or unreasonable in point of law, according to the finding of the jury in point of fact. Although in the class of cases under consideration the question is sometimes submitted to the jury as one of fact, the courts manifest a strong inclination, generally, to treat it as one of law for the sake of that uniformity of decision which is deemed so necessary in all questions of commercial law. But there is no lack of authority to the effect that ordinarily the question is one for the jury's determination. The frequently approved rule is that where the facts are in dispute, it is a question for the jury to determine whether the note was presented in a reasonable time to the maker for payment, so as to bind the indorser; but that where they are ascertained it is a question for the court, and cannot properly be submitted to the jury as a question of fact."

There are many cases which hold that under all circumstances what is a reasonable time is a question of law for the courts. In respect to commercial paper, the authorities are practically unanimous on the proposition that where all the facts are ascertained, either by the pleadings or by special verdict, the court must decide the question as one of law. Discussing the subject in *Goltra* v. *Fenland*, 45 Or. 254 (77 Pac. 129), treating of a case involving the presentment of a claim to an administratrix, and whether or not she had a reasonable time within which to accept or reject it, Mr. Justice BEAN says:

"The more serious objection to the instruction, however, is that it left the question whether the defendant had a reasonable time after the presentation of the claim in which to allow or reject it as one of fact for the jury."

After mentioning the date of presentment as April 18, 1901, and the commencement of the action as September 28th following, the court says:

" * * So that it is admitted by the record that it was almost six months from the time of the presentation of the claim to the commencement of the action; and, as there was no reason offered by the defendant for her delay in not passing upon the claim, the question as to whether she had had a reasonable time in which to do so was for the court, and not for the jury. 'Generally what is a reasonable time,' says Mr. Justice STRAHAN, *in Fleischner* v. *Kubli*, 20 Or. 328 (25 Pac. 1086), 'when the facts are undisputed, is a question of law for the court.' The same rule is stated by Mr. Justice WOLVERTON in *Howell* v. *Johnson*, 38 Or. 571 (64 Pac. 659).

"It is undisputed that the claim was presented to the executrix by the 1st of April, and was in her possession six months later, when the action was commenced. This was clearly a reasonable length of time in which to determine whether she would allow or re-

ject it. The court should have so declared as a matter of law, and not left the question for the jury."

The following authorities teach the same doctrine: *Hadduck* v. *Murray,* 1 N. H. 140 (8 Am. Dec. 43); *Mohawk Bank* v. *Broderick,* 13 Wend. (N. Y.) 133 (27 Am. Dec. 192); *Morse* v. *Bellows,* 7 N. H. 549 (28 Am. Dec. 372); *Utica Bank* v. *Bender,* 21 Wend. (N. Y.) 643 (34 Am. Dec. 281); *Ransom* v. *Mack,* 2 Hill (N. Y.), 587 (38 Am. Dec. 602); *Prescott Bank* v. *Caverly,* 7 Gray (Mass.), 217 (66 Am. Dec. 473); *Hill* v. *Hobart,* 16 Me. 164, 168; *Goodwin* v. *Davenport,* 47 Me. 112 (74 Am. Dec. 478); *Phenix Ins. Co.* v. *Allen,* 11 Mich. 501 (83 Am. Dec. 756); *Walker* v. *Stetson,* 14 Ohio St. 89 (84 Am. Dec. 362); *Parker* v. *Reddick,* 65 Miss. 242 (3 South. 575, 7 Am. St. Rep. 646); *Turner* v. *Iron Chief Mining Co.,* 74 Wis. 355 (43 N. W. 149, 17 Am. St. Rep. 168, 5 L. R. A. 533, and note); *Anderson* v. *Gill,* 79 Md. 312 (29 Atl. 527, 47 Am. St. Rep. 402, 25 L. R. A. 200); *Moxley* v. *Moxley,* 59 Ky. (2 Met.) 309, 311; *McFadden* v. *Henderson,* 128 Ala. 221 (29 South. 640); *Johnson* v. *Arrigoni,* 5 Or. 485; *Collins* v. *Keller,* 62 Or. 169 (124 Pac. 681).

There are many cases in our own reports, such as *Hindman* v. *Rizor,* 21 Or. 112 (27 Pac. 13), *Low* v. *Rizor,* 25 Or. 551 (37 Pac. 82), *Nevada Ditch Co.* v. *Bennett,* 30 Or. 59 (45 Pac. 472, 60 Am. St. Rep. 777), and *Seaweard* v. *Pacific Live Stock Co.,* 49 Or. 157 (88 Pac. 963), which announce that what is a reasonable time is a question of fact under all the circumstances of the case. These, however, were equity cases. The question was what was a reasonable time in which an appropriator of water could employ the same for a beneficial purpose and the court itself decided whether the time described by the evidence was reasonable or otherwise. It can matter little in such cases whether it

be treated as a question of fact or of law, or of mixed law and fact, because the whole controversy is decided by the court. It is important that the law of commercial paper, affecting so strongly, as it does, the business of the country, should be as certain as possible. Besides this, in ordinary commercial paper transactions, the essential facts are much more nearly uniform than in others like, for instance, the useful application of water, and call for more definite standards. For such reasons, the decisions have narrowed the rules until the result is that where the facts are admitted or established beyond dispute, the court must apply the law. Hence we say that since the facts in the present case are admitted by the demurrer, it is for the court to say as a matter of law what was the reasonable time necessary to be observed. The case upon the record is equivalent to one where a jury had returned a special verdict in the language of the complaint, making it incumbent upon the court to render the proper judgment thereon.

1–3. We do not decide that in all cases, without exception, the question of reasonable time is purely one of law. Even as affecting commercial paper, controversies about the facts often may arise, making the issue one of mixed law and fact to be decided by the jury under proper instructions by the court. The principle governing such a case as this is that when the facts are admitted or conclusively established, the court should declare the law resulting from those facts in respect to the reasonableness of the time involved.

When, therefore, as appears on the face of the complaint before us, the check was delivered and accepted in the city where the drawee bank is situated, the reasonable time expired at the close of the next business day, as stated in *Matlock* v. *Scheuerman,* 51 Or. 49

(93 Pac. 823, 17 L. R. A. (N. S.) 747). If beyond that the holder delays presentment for six years, the statute of limitations, considered as one of repose, stills any effort to enforce the liability of the drawer. The holder cannot thus keep the check indefinitely as a menace to the drawer in defiance of the law requiring presentation within a reasonable time and thus extend the statute of limitations *ad libitum*. Consequently, presentment is mandatory and cannot be dispensed with, so that if more than six years have been allowed to lapse where all parties, including the drawee, are in the same city, no action can be maintained upon a presentment made after that time.

The principle is thus expressed in 17 R. C. L. 727:

"The period of time after which the right to bring suit on a check is usually barred, is five or six years after the expiration of a reasonable time for presenting the check for payment."

It is so directly decided in *Scroggin* v. *McClelland*, 37 Neb. 644 (56 N. W. 208, 40 Am. St. Rep. 520, 22 L. R. A. 110). The same doctrine is taught in *Dolon* v. *Davidson*, 39 N. Y. Supp. 394 (16 Misc. Rep. 316). In that case, indeed, there was involved a statute computing the period of limitation from the time when the right to make a demand arose where a demand was necessary to sustain an action, but the court held that the enactment was no more than a codification of the previous rule.

4. Before an action can be maintained against a drawer upon a check, demand for its payment must be made upon the drawee bank. Such demand, however, cannot be deferred indefinitely. That a demand necessary to support a cause of action must be made within the statute of limitations is taught in the cases here

noted: *Morrison's Admr.* v. *Mullin,* 34 Pa. St. 12; *Clements* v. *Lee,* 8 Tex. 374; *Thompson* v. *Whitaker Iron Co.,* 41 W. Va. 574 (23 S. E. 795); *Cadman* v. *Rogers,* 10 Pick. (Mass.) 112; *Palmer* v. *Palmer,* 36 Mich. 487 (24 Am. Rep. 605); *Moherin* v. *San Francisco Produce Exchange,* 117 Cal. 215 (48 Pac. 1074); *First National Bank* v. *King,* 60 Kan. 733 (57 Pac. 952); *Sheaf* v. *Dodge,* 161 Ind. 270 (68 N. E. 292); *Hitchcock* v. *Cosper,* 164 Ind. 633 (73 N. E. 264); *Grotefend* v. *May,* 33 Cal. App. 321 (165 Pac. 27); *Caner* v. *Owner's Realty Co.,* 33 Cal. App. 479 (165 Pac. 727); *Purcell Bank & Trust Co.* v. *Byars* (Okl.), (167 Pac. 216); *Douglas County* v. *Grant County,* 98 Wash. 355 (167 Pac. 928).

The plaintiff relies on Section 6019, L. O. L.:

"A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

—and contends that the only relief for the drawer is to recoup any damage he may have suffered by the delay in presenting the check. This provision must be taken, however, in connection with other equally cogent rules on the subject of limitations already noted and must be construed so that both shall stand. We conclude that the excerpt quoted refers to conditions and delays happening before the six-year period of limitations expires. Under this section, the effect of delay not extended beyond the statute of limitations is to release the drawer of a check only to the extent of the damages he has suffered; but another result is that if presentment is postponed beyond the six-year period fixed by law, and no excuse for it is shown, he is discharged by operation of the statute of limitations.

The plaintiff by failing to make the necessary demand on the bank within the statute of limitations allowed her claim on the defendant to lapse.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Motion to dismiss appeal denied January 29, rehearing denied February 19, 1918, argued on the merits February 27, reversed March 25, rehearing denied April 22, 1919.

DUNIWAY *v.* CELLARS-MURTON CO.

(170 Pac. 298; 179 Pac. 561.)

ON MOTION TO DISMISS.

Appeal and Error—Assessments—Payment Under Protest—Effect.

1. After certain property was sold under a sewer assessment the owner sued to quiet title, claiming that the assessment was void. The court decreed that defendant had an interest by reason of the sale which would mature in the absence of redemption within three years, and the owner appealed. Pending appeal, fearing the time for redemption would expire, he paid the assessment under protest, expressly reserving all rights arising from the appeal. *Held*, the payment was not a waiver, and furnished no ground for dismissing the appeal.

ON THE MERITS.

Municipal Corporations—Sewers—Assessment—Benefit—Necessity.

2. Land which is not, and cannot be, drained by a sewer cannot be assessed therefor.

Municipal Corporations—Sewers—Assessments.

3. Under Portland City Charter, Section 389, a property owner cannot be assessed for a sewer unless he receives a special benefit therefrom.

Municipal Corporations—Sewers.

4. Under Portland City Charter, Section 389, an assessment for a sewer was void, where sewer was laid through private land of another, and land owner could not use it without being a trespasser.

Quieting Title—Matters Occurring After Action Brought.

5. In action to quiet title, title is to be determined by conditions as they existed at time issues were made.

Quieting Title—Scope of Inquiry.

6. A special assessment levied for a municipal improvement may be questioned and tested in a suit to quiet title to real property assessed.

Municipal Corporations—Improvements—Assessments—Sale—Right of Purchaser.

7. Purchaser at sale for street assessment, in absence of fraud, is governed by rule of caveat emptor, and after purchase, if it transpires that assessment is void, such purchaser obtains no title to or equity in land purchased.

Pleading — Supplemental Pleading—Matters Occurring After Issue Joined.

8. In suit to quiet title, where purchaser at sale for street assessment was a defendant, assessment being void at time made by reason of sewer being laid through private property, subsequent proceedings by city for obtaining an extension of street where sewer was laid might form basis for a reassessment, but could not validate assessment made prior to suit; subsequent matter not being brought into suit by any supplemental pleading.

Quieting Title—Burden of Proof.

9. In suit to quiet title, burden was upon defendant, who purchased the land at a sale for street assessment, to allege and prove his interest in the property.

[As to right to maintain suit to remove lien of special assessment as cloud on title, see note in **Ann. Cas. 1914A, 888.**]

From Multnomah: EDWIN V. LITTLEFIELD, Judge.

This is a motion to dismiss an appeal. The facts are these: Certain property of the appellant valued at $750 which was included in a sewer assessment made by the City of Portland, said assessment amounting to $74.07. In January, 1915, said assessment being unpaid and delinquent, the city treasurer in compliance with the charter and ordinances of the City of Portland, sold the property to respondent for the sum of $84.60 and issued a certificate of sale of said property; thereupon appellant claiming that the assessment and sale were invalid brought a suit to quiet his title which being decided adversely he appealed to this court giving the usual bond for costs and disbursements.

The court below decided among other matters that the respondent had a valid claim upon and interest in

said property by reason of said treasurer's sale, and that if no redemption should be made therefrom within three years from the date of the certificate of sale the defendant would be entitled to receive a deed to said property in accordance with the charter and improvement code of the City of Portland. While the appeal was pending here the appellant foreseeing that the three years allowed for redemption might elapse before the appeal could be heard, paid to the auditor of the City of Portland under protest the amount of the assessment, costs and penalties, and in writing notified respondent that he in no way waived his appeal, and that he intended to prosecute the same and if the decree of the Circuit Court should be reversed he would expect to recover the money so paid. Based upon this payment the respondent moves to dismiss the appeal upon the ground that by such payment the appellant has recognized and complied with the decree and can have no further interest in the prosecution of the appeal. MOTION DENIED.

Mr. George S. Shepherd and *Mr. George B. Cellars*, for the motion.

Mr. Ralph R. Duniway and *Mr. James R. Bain, contra.*

McBRIDE, C. J.—1. The redemption under the circumstances under which it was made was not voluntary and, as shown by the protest accompanying it, was not made with any intent to waive appellant's rights on appeal. In similar cases we have held that such a payment does not furnish ground for dismissal of the appeal: *Edwards* v. *Perkins*, 7 Or. 149; *Moores* v. *Moores*, 36 Or. 261 (59 Pac. 327); *Eilers Piano House* v. *Pick*, 58 Or. 54 (113 Pac. 54). See, also, *Plano Mfg.*

Co. v. *Rasey,* 69 Wis. 246 (34 N. W. 85); *Bush* v. *Aetna Bldg. & Loan Assn.,* 51 Okl. 529 (151 Pac. 850); *Warner Bros.* v. *Freud,* 131 Cal. 639 (63 Pac. 1017, 82 Am. St. Rep. 400).

This holding is not to be confounded with those cases holding that a party voluntarily accepting the benefits of a decree or voluntarily doing some act inconsistent with his contention on the appeal is precluded from maintaining such appeal, or with those cases in which the entire subject matter of the appeal having disappeared there would be nothing left which a reversal of the decree could affect. In the case at bar the appellant in the event of reversal would be entitled by appropriate proceedings for that purpose, to a restitution of the moneys which he was compelled to pay to prevent a deed to his property being issued by the city treasurer: *McFadden* v. *Swinerton,* 36 Or. 336, 354 (59 Pac. 816, 62 Pac. 12).

The motion is overruled.

MOTION TO DISMISS DENIED.

Reversed March 25, rehearing denied April 22, 1919.

ON THE MERITS.

(179 Pac. 561.)

Department 2.

This is a suit to quiet title to Lot 3, Block 3, including one half of vacated street east of and adjoining Block 3, Norton's subdivision of Lot 10, Town of Wayne, in the City of Portland, Oregon. From a decree in favor of defendant, plaintiff appeals.

The complaint is in the usual form. Defendant answered, claiming an interest in the real property ad-

verse to plaintiff to the extent, that the City of Portland, pursuant to its charter, improvement Code and ordinances, constructed a sewer known as the East 33d Street Extension of the Sullivan Gulch Sewer, and by Ordinance 26,778 assessed benefits to the above premises in the sum of $74.07, which sum was duly entered in the docket of City Liens April 4, 1913, as against the premises and the same being unpaid on January 7, 1915, was sold to the defendant to satisfy such assessment, for $84.60, the amount of the lien, interest and costs of sale, and a certificate of sale was issued to defendant by the city treasurer, and that no redemption had been made.

Plaintiff filed a reply denying defendant's interest in the property and denying that the property was benefited by anything the city did. Upon the trial the facts were stipulated as follows:

"That the City of Portland built the Thirty-third Street sewer, and it extends from the river along north on East Twenty-ninth Street in front of the property of plaintiff; that said sewer before reaching the property of the plaintiff was built by the city through the property of J. J. Fraser without securing a right of way and as a trespasser, and that the property of the plaintiff must drain into this sewer down through the property of Mr. Fraser; and that the city built the sewer across the property of Mr. Fraser without securing a right of way, and attempted to assess Mr. Fraser's property, as well as the property of the plaintiff, and that Mr. Fraser brought suit in the Circuit Court of the State of Oregon for the county of Multnomah against the City of Portland to cancel the assessment and to secure a mandatory injunction removing the sewer from the property; that that case was carried to the Supreme Court of the State of Oregon and a decree was rendered, and the Supreme Court has, in the case of J. J. Fraser against the City of Portland, adjudicated that the City of Portland built the sewer

through the property of Mr. Fraser without a right of way, and as a trespasser, and that Mr. Fraser was entitled to a mandatory injunction to have that sewer removed within a reasonable time, unless the city secured a right of way from him; and that also a decree was secured in that suit canceling the assessment made by the City of Portland upon Mr. Fraser's property; and while this condition existed the city attempted to levy this assessment upon the property of the plaintiff, attempted to offer it for sale, and the defendant attempted to buy it in, and since the institution of this suit—that is, within the last month—the city purchased a right of way from Mr. Fraser for this sewer, and for street purposes. * * "

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Ralph R. Duniway.*

For respondent there was a brief over the names of *Mr. George S. Shepherd* and *Mr. G. B. Cellars,* with an oral argument by *Mr. Shepherd.*

BEAN, J.—2, 3. The question raised in this case is whether or not the assessment against the real property of plaintiff was valid so that the defendant obtained an interest in the real property by virtue of the certificate of sale made to satisfy the lien. In *Fraser* v. *Portland,* 81 Or. 92 (158 Pac. 514), it was held that the sewer being constructed over the private property of Mr. Fraser, the plaintiff in that suit, the city was a trespasser and the assessment against Mr. Fraser's property was canceled; that he was entitled to have the sewer removed unless the right of way was acquired within a reasonable time. The claim is made on behalf of the defendant that although the assessment was void as to Mr. Fraser, the owner of the property trespassed upon by the city in laying the sewer, a dif-

ferent rule would prevail as to the plaintiff Mr. Duniway. There is an apparent contrariety of opinion on the question involved largely perhaps on account of the difference in facts of the various cases. As affecting the assessment of the real property of plaintiff Duniway who was not the owner of the realty trespassed upon, the validity of the assessment against his property depends upon whether or not such property was benefited by the construction of the sewer. Land which is not and cannot be drained by a sewer cannot be assessed therefor: 1 Page and Jones on Taxation by Assessment, §§ 400, 401. The council of the City of Portland by the city charter is empowered to order to be constructed sewers and drains and to levy and collect an assessment upon all lots and parcels of land "specially benefited by such sewers and drains, to defray the whole or any portion of the cost and expense thereof": Charter of Portland, § 389. No special assessment is authorized to be levied upon land for the payment of the construction of a sewer, unless as a necessary incident, a corresponding special benefit accrues to the property upon which the burden is attempted to be laid. As stated in 1 Page and Jones on Taxation by Assessment, Section 400:

"If the location of the private property through which the sewer runs is such that A. cannot make use of such sewer without trespassing on such private land, A. may resist an assessment therefor, even if the city has an easement to maintain the sewer (citing *State ex rel. McKune* v. *District Court of Ramsey County,* 90 Minn. 540 (97 N. W. 425). This, however, involves not the nature of the improvement but the benefit to the land assessed. * * "

This we believe to be the reasonable rule in such cases and one which is supported by the weight of authority: *Fraser* v. *Portland,* 81 Or. 92 (158 Pac. 514);

Matter of Rhinelander, 68 N. Y. 105; 2 Elliott on Roads and Streets (3 ed.), 681; notes to *Reiff* v. *Portland,* L. R. A. (N. S.) 1915D, p. 772; *Hershberger* v. *City of Pittsburgh,* 115 Pa. St. 78 (8 Atl. 381); *Baltimore* v. *Hook,* 62 Md. 371; *Marshall's Appeal,* 210 Pa. St. 537 (60 Atl. 160); *Matter of Petition of Charles A. Cheesebrough,* 78 N. Y. 232; *Spaulding* v. *Wesson,* 115 Cal. 441 (47 Pac. 249).

4. At the time plaintiff's land was assessed and sold to the defendant to satisfy the lien, the plaintiff could not use or receive any benefit from the sewer laid over the land of J. J. Fraser without being a trespasser. Mr. Fraser had the right at that time to have the sewer removed, and there being no benefit accruing to plaintiff's realty by virtue of the improvement, the municipal authorities of Portland had no right to assess plaintiff's property and the assessment was void: Hamilton on Special Assessments, § 604.

5–8. We are to determine the title to the land in question in this suit by the conditions as they existed at the time issues herein were made. The fact that about two years afterward the city made the second attempt to obtain a right of way for the sewer does not affect the title to plaintiff's land. In other words, an assessment for a sewer or other municipal improvements cannot be made upon real estate which is not benefited thereby upon credit, or upon the prospect that some time in the future proceedings will be taken so that the real property assessed will be benefited: *Carpenter* v. *Commissioners,* 56 Minn. 513 (58 N. W. 295). A special assessment levied for a municipal improvement may be questioned and tested in a suit to quiet title to the real property assessed. A purchaser at a sale for a street assessment in the absence of fraud is governed by the rule of *caveat emptor,* and after the

purchase if it transpires that the assessment is void, such purchaser obtains no title to or equity in the land purchased: *Evans* v. *Meridian Investment & Trust Co.*, 84 Or. 246 (163 Pac. 1165); *Keenan* v. *City of Portland*, 27 Or. 544 (38 Pac. 2). The subsequent proceedings by the city for obtaining an extension of the street where the sewer was laid under proper conditions might form the basis for a reassessment, but could not validate an assessment made prior to a suit involving title to land assessed, when such right of way was obtained long after the issues in the suit were raised and no subsequent matters were brought into the suit by any supplemental pleading.

9. The burden was upon the defendant to allege and prove its interest in the real property in question in this suit. It alleged such interest. This was denied by the plaintiff in the reply, and we think the question as to the special benefit accruing to plaintiff's property by virtue of the construction of the sewer, and therefore the validity of the assessment and sale upon which defendant relies, were squarely raised: 17 Ency. of Pl. & Pr. 349, 350; *Savage* v. *Savage*, 51 Or. 167, 170 (94 Pac. 182); *Moores* v. *Clackamas County*, 40 Or. 536 (67 Pac. 662); *Evans* v. *Meridian Investment & Trust Co.*, 84 Or. 246 (163 Pac. 1165); *Fraser* v. *Portland*, 81 Or. 92 (158 Pac. 514); *Clark* v. *City of Salem*, 61 Or. 116–121 (121 Pac. 416, Ann. Cas. 1914B, 205), involved a street improvement. At the time of the initiation of proceedings for such improvement half of the land sought to be used therefor was private property. It was held that the assessment was enforceable after the completion of the opening of the street. In that case the right of way was obtained before any suit was instituted. The facts in that case differ from

those in the one now under consideration. It is shown that the plaintiff in this case compromised the assessment as to other lots. We fail to see how this affects the present suit in any way.

The decree of the lower court will be reversed and one entered here in conformity to the prayer of plaintiff's complaint.

REVERSED. DECREE ENTERED. REHEARING DENIED.

MCBRIDE, C. J., and HARRIS and BENNETT, JJ., concur.

Argued March 20, affirmed April 8, rehearing denied April 22, 1919.

COOPER *v.* BOGUE.

(179 Pac. 658; 180 Pac. 103.)

Appeal and Error—Writ of Review—Appeal—Concurrent Remedies.

1. A party cannot prosecute an appeal from a judgment while a writ of review to the same court is pending, since the two remedies, though concurrent, cannot be exercised at the same time.

ON REHEARING.

Courts—District Court—Appeal—Trial of Cause Anew.

2. Section 556, L. O. L., providing that on appeal from judgment of County Court the action shall be tried anew on substantially the issues tried in the lower court, includes issues of fact as on denial of pleading and issues of law as on demurrer to a pleading.

Certiorari—Writ of Review—Issues Presented.

3. Only issues of law may be decided on a writ of review.

Appeal and Error—Concurrent Remedies—Election.

4. Where plaintiff elected to proceed by review for correction of errors complained of, it barred his subsequent appeal for the correction of errors of law as well as on his issues of fact; Section 605, L. O. L., making a writ of review and remedy of appeal concurrent but not cumulative, so that choice of one is a waiver of the other.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 1.

On September 1, 1917, plaintiff began this action in the District Court of Multnomah County, to recover from the defendant $30.90, upon an account stated The defendant answered, denying the material allegations of the complaint, and also pleaded affirmatively three separate counterclaims. Plaintiff demurred to the affirmative answers, and on November 2, 1917, the demurrer was overruled, and plaintiff refused to plead further. On November 12, 1917, the case was tried in the District Court, resulting in a judgment rendered on the pleadings, in favor of the defendant. On November 20, 1917, plaintiff filed his petition for a writ of review in the Circuit Court, and on the same day the writ was allowed. On December 5, 1917, plaintiff applied to the judge of the District Court for an order allowing an appeal from the same judgment, which was allowed and the appeal was thereafter perfected. On January 2, 1918, defendant moved to dismiss the appeal, on the ground that a writ of review was then pending in the Circuit Court in the same action, which motion was allowed, and a judgment entered in favor of defendant for his costs and disbursements upon the appeal, and plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. W. L. Cooper.*

For respondent there was a brief over the names of *Mr. J. Leroy Smith* and *Mr. J. M. Hickson,* with an oral argument by *Mr. Smith.*

BENSON, J.—1. This case presents but one question for our consideration. Can a party prosecute

an appeal from a judgment while a writ of review to the same court is still pending? This question has been definitely answered in the negative by this court, in the case of *Clubine* v. *City of Merrill*, 83 Or. 87 (163 Pac. 85). The two remedies are concurrent but they cannot be exercised at the same time.

The judgment of the lower court is therefore affirmed. AFFIRMED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Denied April 22, 1919.

ON PETITION FOR REHEARING.

(180 Pac. 103.)

Former decision adhered to. REHEARING DENIED.

Mr. W. L. Cooper, for the petition.

Mr. J. Leroy Smith and *Mr. J. M. Hickson, contra.*

In Banc.

BURNETT, J.—In his petition for rehearing the plaintiff criticises the opinion written by Mr. Justice BENSON which stated in substance that this was an action to recover upon an account stated, in which the defendant answered denying the complaint and pleading three separate counterclaims and that the action resulted in a judgment for the defendant on the pleadings. In substance, the critique is that inasmuch as there was present the general issue arising from the denial in the answer and there was a recital in the

judgment that a witness was sworn and testified, there must have been a trial of an issue of fact and hence the opinion was erroneous in stating that the result was a judgment on the pleadings.

The opinion did not attempt to say whether the disposition of the case by the original trial court was correct or not; it simply stated the fact which the record discloses. It may be true that there was an issue of fact involved, and it may be true also, as stated in the journal entry of the District Court, that a witness was sworn and testified, but it also appears that there was in that court a motion for a judgment on the pleadings and that the court placed its decision upon the ground that the plaintiff had refused to reply to the counterclaim. A judgment was thereupon rendered for the full amount of the defendant's counterclaim, a result that could be achieved only by considering the proceeding as a motion for judgment on the pleadings. Whether it was correct or erroneous was not the question presented for our consideration.

What we undertook to decide and did decide was that under the statute, Section 605, L. O. L., the writ of review and the remedy by appeal are concurrent, so that if a litigant is dissatisfied with the result of a case in an inferior court he may choose either of the two remedies as he may be advised, but having made his election it amounts to a waiver of the other proceeding.

The precedents cited by the plaintiff in his petition for rehearing, viz., *Schirott* v. *Phillippi*, 3 Or. 484, *Evans* v. *Christian*, 4 Or. 375, *Sellers* v. *Corvallis*, 5 Or. 273, and *Ramsey* v. *Pettengill*, 14 Or. 207 (12 Pac. 439), were all decided before the legislation embodied in the present form of Section 605, concerning which the learned annotator of Lord's Oregon Laws says:

"The amendment of this section in 1889, making the writ concurrent with the right of appeal, makes it unnecessary to annotate the cases with respect to that question under the old statute."

As shown by the exemplification of the writ of review attached to the petition for rehearing and the abstract the chronology of the proceeding is this: Plaintiff's demurrer to the counterclaim was overruled November 2d; the trial and final judgment on the pleadings, as stated above, occurred November 12th; the writ of review was sued out November 20th; and the appeal was allowed December 5th; all in the year 1917. The cause was ripe for either appeal or review when final judgment was entered in the District Court.

2. If the plaintiff had been content only to appeal from the final judgment of the District Court, he might have raised in the Circuit Court all the questions of law he urged by demurrer to the answer and secured, as well, a determination of the issue of fact arising from the traverse of his complaint. The reason for this statement is found in Section 556, L. O. L., which declares that

"Upon an appeal from the judgment of a County Court or Justice's Court, the action shall be tried anew, upon substantially the issues tried in the court below."

3, 4. These may be issues of law, as upon demurrer to a pleading, or issues of fact, as upon denial of a pleading, all of which may be determined upon appeal to the Circuit Court, while only issues of law may be decided on a writ of review. It would lead to endless confusion if a litigant could review part of a proceeding of an inferior court and appeal from the remainder. All the statute has done is to make the two remedies concurrent, thus giving a party his choice

between the two. But the legislature has not made them cumulative and hence the choice of one is a waiver of the other. If the aggrieved party takes out a writ of review, he abandons his contention about the facts and stakes his case on the issues of law. The plaintiff had clearly elected to proceed by review for the correction of the errors of which he complained. Having thus elected it put the quietus upon his subsequent appeal for the correction of the same errors of law as well as upon his issues of fact.

We adhere to the former decision.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued April 8, affirmed April 22, 1919.

WARREN *v.* SMITH.

(180 Pac. 97.)

Landlord and Tenant—Action for Rent—Instructions—Surrender of Lease.

1. In an action to recover rent reserved under a lease, where the defense was acceptance of surrender of the lease by the lessor, instructions defining surrender by operation of law, and specifying numerous acts which would not alone warrant a finding of surrender, *held* fully and fairly to present that issue to the jury.

Trial—Instructions—Exclusion of Issues.

2. Where a tenant claimed release from payment of the rent under a certain contract, and also by surrender by operation of law, an instruction that the burden was on the tenant to show release, and that he claimed release under the contract, was properly refused as depriving defendant of his other defenses.

Trial—Instruction—Evidence.

3. An instruction that plaintiffs could recover rent under a lease to a specified date was properly refused, where there was evidence from which the jury could infer a surrender of the lease by operation of law at an earlier date.

From Multnomah: ROBERT TUCKER, Judge.

Department 2.

On March 17, 1911, plaintiffs executed a written lease of a certain building known as No. 201 and 201½ East Twenty-fourth Street, and all buildings on Lot 18, Block 38 of Sunnyside, in the City of Portland, to Samuel H. Smith, Chester A. Smith and Otis S. Smith, partners doing business as S. H. Smith & Sons, for a period of five years from April 1, 1911, at an agreed rental of $50 per month, payable in advance. On June 6, 1916, for failure to pay the stipulated rent the plaintiffs commenced this action alleging the partnership, the execution of the lease to the defendants and that rent for the period of twenty-eight months and a balance of $8 for the month of November, 1913, was due and owing. A copy of the lease was attached to the complaint as an exhibit.

Service was made upon the defendant S. H. Smith only, who appeared and filed his answer, in which he admitted the partnership and the execution of the lease as alleged, and denied all other material allegations of the complaint. For a further and separate answer he alleged that about March 15, 1912, he assigned all of his right, title and interest in the lease to Smith Brothers and Goodman, a partnership consisting of Chester A. Smith, Otis S. Smith and Ralph V. Goodman; that after that date he did not have any interest in or connection with the lease in question;

"that said plaintiffs recognized and accepted said assignment of the interest of this defendant in said lease of the premises described therein and accepted the rentals of said premises from the firm of Smith Bros. and Goodman, and accepted said firm as tenants and lessees thereon, and thereby released this defendant from liability under said contract of lease";

that about January 2, 1913, Otis Smith assigned his interest in the lease to Chester A. Smith, who thereby became the exclusive lessee and tenant of the premises; and that in April, 1913, the plaintiffs entered into a new contract with Chester A. Smith by which the firm of S. H. Smith & Sons and the defendant S. H. Smith in particular were released from any obligation then existing under the lease.

To the answer the plaintiffs filed a reply in which they denied such allegations, upon information and belief, and made a specific denial of paragraph 5 thereof, in which it is alleged that "large sums of money from sundry and divers persons, the exact amount of which this defendant does not know" were paid on the lease.

When plaintiffs rested, defendant moved for a nonsuit, and after all testimony was taken plaintiffs moved for a directed verdict. Both motions were overruled.

After receiving its instructions, the jury returned a verdict for the defendant, upon which judgment was entered and from which the plaintiffs appealed, claiming that the court committed error in refusing to instruct the jury to return a verdict for the plaintiffs and to give their requested instructions numbered 7 and 8, as follows:

"(7.) The lease being admitted, the burden is on the defendant to prove that he has been released from his obligation to pay the rent stipulated for the entire term. Defendant claims that he has been released from this payment by reason of a contract entered into between plaintiffs and Chester A. Smith. I instruct you that there has been no proof of any such contract."

"(8.) Defendant further claims that he surrendered his lease to plaintiffs who accepted such surrender. I instruct you that no evidence has been offered sufficient

to show any such surrender prior to September, 1915. I therefore instruct you that plaintiffs are entitled to recover from defendant all unpaid rentals on this lease until September 1, 1915, amounting, as appears by the undisputed testimony, to $1058." AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. M. B. Meacham.*

For respondents there was a brief and an oral argument by *Mr. H. B. Adams.*

JOHNS, J.—At the inception of the trial, for the reason that it had not been pleaded as a defense, objection was made to the introduction of any testimony tending to show that the plaintiffs had released the property in September, 1915, but when the letters were offered in evidence, tending to show a releasing and that another lease of the property was actually executed by the plaintiffs to a third person, their counsel expressly stated there was "no objection" and the evidence was received without objection and the case was tried by the defense upon the theory that the subsequent acts and conduct of the plaintiffs, after the assignment of the original lease by S. H. Smith to Smith Brothers and Goodman, amounted to a surrender of the original lease by operation of law as to S. H. Smith at the time he sold out and retired from the firm and that he was then discharged from any further liability. The plaintiffs disputed that contention and claimed that he was yet liable for the amount of the unpaid balance of the rental under the terms of the original lease.

That was the issue upon which the case was tried, upon which the court instructed the jury, and the jury found for the defendant.

1. It appears from the bill of exceptions that "counsel for both parties state that there was no express surrender of the lease." The jury was then instructed that it was a question of intent as to whether there was a surrender by operation of law, concerning which the court gave the following instruction:

"The mere negotiations for a reduction of rent not followed up by a contract would not be a fact in itself warranting such a conclusion of a surrender. The fact of turning over the keys would not in itself be sufficient. But you gentlemen are to determine from all these facts and all these circumstances what was in the minds of the parties at this time, what was the intention of the parties in this conduct which has been produced here before you."

The court also instructed the jury "as a matter of law that the assignment of the lease by defendant S. H. Smith in itself could not release him from the payment of the rent without the release of him by the plaintiff," and the fact that Mr. Smith "sold his interest in the lease to other parties, with or without the consent of the plaintiff, would not necessarily imply that he was releasing Mr. Smith from the operation of the original lease," and that the reduction of the rent in itself would not be such a fact as would release the defendant S. H. Smith, and that the mere negotiations for a reduction of rent, not followed up by a contract, would not be a fact in itself warranting such a conclusion of a surrender. The court gave this instruction:

"A surrender takes place by operation of law when the parties, without an express surrender, do some act which implies that they have mutually agreed to consider a surrender made, and when the keys are delivered and the possession resumed by the plaintiff, it is for you to determine whether the possession is of an exclusive character, with the apparent intention of keeping and controlling the premises as plaintiff's

own property, to the exclusion of the tenant in case the tenant desires to return."

No exceptions were taken to any of the instructions which were given by the court.

The question as to whether there had been a surrender by operation of law was fully and fairly submitted to the jury, and there is ample evidence to sustain the verdict.

2. There was no error in refusing to give plaintiffs' requested instruction number 7. Under that instruction the defendant would be deprived of all other defenses and the only question for the jury to determine would be whether he was released "from this payment by reason of a contract entered into between plaintiff and Chester A. Smith."

3. There was no error in refusing plaintiffs' requested instruction number 8. That would exclude from the jury all testimony of a surrender "prior to September, 1915," and in legal effect would instruct the jury to return a verdict for plaintiffs for $1,058, and the amount claimed at the trial was $1,408.

After a careful consideration of the record, we think the plaintiffs had a fair trial and that there was ample evidence from which the jury could find there was a surrender of the lease by operation of law.

Judgment is affirmed. AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued March 25, affirmed April 22, 1919.

STATE v. MALLORY.

(180 Pac. 99.)

Fornication—Corroboration of Injured Female.

1. Section 1542, L. O. L., specifically requiring that the evidence of the female abducted or seduced must be corroborated, applies to abduction and seduction only, and not to the crime of fornication, defined in Section 2077.

Fornication—Previous Chaste Character of Female—Evidence.

2. In a prosecution under Section 2077, L. O. L., providing that any male person over eighteen years old, who shall in such a manner as not to constitute rape carnally know any female person of previous chaste and moral character over sixteen and under eighteen years of age and not his lawful wife, shall be deemed guilty of fornication, evidence *held* sufficient to show that the prosecutrix was of previous chaste character.

Criminal Law—Review—Instructions—Rape—Verdict—Evidence.

3. In a prosecution under Section 2077, L. O. L., for fornication, where prosecutrix was over sixteen years old, so that the crime could not be rape, under Section 1912, and the jury was instructed on forcible rape, and that if defendant's acts constituted rape he must be acquitted of the fornication charged, it must be assumed the jury by its verdict of guilty found defendant's acts did not constitute rape.

Criminal Law—Witnesses—Accomplices—Intent.

4. The provision of Section 1540, L. O. L., that a conviction cannot be had upon the uncorroborated testimony of an accomplice connecting defendant with the crime, does not apply to a conviction of fornication under Section 2077, under which the male person only can be guilty, and where the evidence shows that prosecutrix was not an accomplice, because she did not knowingly, voluntarily, and with a common intent unite in the commission of the crime.

[As to corroboration, see note in 139 Am. St. Rep. 377.]

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 2.

The defendant, a naturopathic physician, was indicted, tried and convicted under the provisions of Section 2077, L. O. L., which is as follows:

"If any male person over the age of eighteen years shall, in such manner as does not make the act rape, carnally know any female person of previous chaste

and moral character, who is over the age of sixteen years and under the age of eighteen years, and is not his lawful wife, such male person shall be deemed guilty of fornication, and upon conviction thereof, shall be punished by a fine of not less than $50 nor more than $400, or by imprisonment in the county jail for not less than one month nor more than one year, or by imprisonment in the penitentiary not less than one year nor more than five years."

The alleged crime was committed in his office in the Broadway Building at the corner of Broadway and Morrison Streets in the City of Portland, between 2 and 3 o'clock P. M. on Friday, April 19, 1918.

The evidence tends to show that the prosecuting witness was a country girl seventeen years of age, who for many years had been and then was living with her parents on a farm near Milwaukie. In addition to a goiter she had female trouble for which, through the advice of her parents, she had received former treatments from other physicians but without success. Friends of the family recommended the defendant, the parents took the daughter to his office and after consultation an agreement was made by which the defendant was to give her thirty treatments, for which they were to and did pay him $50 in advance. After all such treatments had been given, covering a period of about forty days, under the representations of the defendant as to the girl's improved condition and with the advice and approval of her parents, they were continued and in all covered a period of about sixty days.

The treatments in question consisted of massages and the application of various electrical apparatus, during the course of which the girl was required to and did remove all of her clothing. The testimony also shows that she furnished her own kimona, but it is not clear as to whether her clothing was removed in the

presence of the defendant or not. In taking the treatments the girl was usually accompanied by her mother, but on the particular day mentioned they separated at Milwaukie at 1:30 P. M., the mother went to assist in Red Cross work and the daughter went alone to the office of the defendant. On her arrival at the office there was present one other patient, who left within a very short time.

The prosecuting witness was greeted by the defendant, who inquired if she was alone, and where her mother was. The testimony tends to show that upon being advised that she was alone and that her mother was assisting in some Red Cross work, the girl was then escorted into the inner room, or private office, where, at defendant's request, all of her clothing was removed, after which he locked all the doors leading into the room and then proceeded with his usual course of treatment, during which he made improper proposals, representing that what he suggested was for the girl's own good, and necessary to effect a permanent cure, which finally culminated in the commission of the act of which the defendant was convicted. While not very clear, the testimony also indicates that the girl offered some resistance; that she was somewhat dazed and thought herself to be under a hypnotic influence.

On the same day, within a few hours after she returned to her home, the girl informed her mother, who in turn told the father what had occurred, and the three returned to Portland on the following morning. There, by advice of the district attorney, the girl was examined by two disinterested reputable women physicians who found and testified that her hymen was ruptured and her private parts badly lacerated, and gave their opinion that this condition was caused

by sexual intercourse within the past twenty-four hours.

On April 30th, about two weeks before the indictment was found, the girl's mother called at the defendant's office to get her daughter's kimona and a sheet, at which time nothing was said by either party except that the mother asked for the articles.

On the following day the defendant left his office and ceased to practice his profession.

At the conclusion of the state's testimony, the defendant moved the court "to direct the jury to find the defendant not guilty, on the ground that the state had failed to produce testimony sufficient to go to the jury." At the conclusion of all of the testimony the defendant again moved the court "to direct the jury to return a verdict of not guilty, for the reason that the evidence was insufficient to permit the case to go to the jury." The motions were denied and exceptions were duly taken and allowed.

The defendant requested the following instructions, which the court refused to give, and to this ruling exceptions were duly taken:

"(1). In this case I instruct you that before you can find the defendant guilty the testimony of the complaining witness [naming the girl] must be corroborated and this corroboration must not only be as to the circumstances of the case but also as to the person of the defendant. In other words, the testimony of —— [the complaining witness] must be corroborated to the effect that intercourse was had with her, and that defendant committed the act. It is not enough to show corroboration of the intercourse but there must be corroboration of her testimony that the defendant was the party who had intercourse with her.

"(2). The prosecuting witness [naming her], being a party to this alleged act, it is your duty to

view and consider her testimony with caution and unless you find that her testimony is corroborated and that such corroboration connects this defendant with the commission of said alleged crime, it is your duty to find the defendant not guilty."

It appears from the bill of exceptions that

"there was corroboration of the testimony of the witness aforesaid to the effect that sexual intercourse had been had with her on the day named in her testimony, but there was no corroboration of her testimony to the effect that defendant had had such intercourse."

Her evidence "was contradicted in all substantial parts by the testimony of the defendant, and by the testimony of Rose Mallory, the defendant's wife."

From conviction and sentence the defendant prosecutes this appeal, contending that the court erred in refusing to give each of the above instructions, and in refusing to direct a verdict for the defendant.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Wallace McCamant* and *Mr. Frank S. Senn,* with an oral argument by *Mr. McCamant.*

For the State there was a brief over the names of *Mr. George M. Brown,* Attorney General, *Mr. Walter H. Evans,* District Attorney, *Mr. E. F. Bernard,* Deputy District Attorney, and *Mr. John A. Collier,* Deputy District Attorney, with oral arguments by *Mr. Brown* and *Mr. Bernard.*

JOHNS, J.—To commit the crime with which the defendant is charged under Section 2077, L. O. L.: First, the offender must be a male person over the age of eighteen years, and it must be committed so as not to make the act rape; second, the offender must

"carnally know any female person of previous chaste and moral character"; third, who is over the age of sixteen years and under the age of eighteen years, and is not his lawful wife; and when so committed, such male person shall be deemed guilty of fornication and upon conviction thereof shall be punished, etc. By the specific provisions of the statute, the commission of fornication is limited and confined to male persons only, and could not be committed by a female. It can be committed only by a male person over the age of eighteen years, upon a "female person of previous chaste and moral character," who is over the age of sixteen years and under the age of eighteen years. The above section specifically provides that "such male person shall be deemed guilty of fornication" and punished accordingly. It should also be noted that there is no provision in this section requiring the testimony of the female to be "corroborated by some other evidence tending to connect the defendant with the commission of the crime." This section was enacted in 1905.

1. The defendant cites and relies upon Section 1542, L. O. L., which is as follows:

"Upon a trial for inveigling, enticing, or taking away an unmarried female for the purposes of prostitution, or for having seduced and had illicit connection with an unmarried female, the defendant cannot be convicted upon the testimony of the female injured, unless she is corroborated by some other evidence tending to connect the defendant with the commission of the crime."

But Section 1542 was enacted in 1864 and specifically provides that the evidence of the female abducted or seduced must be corroborated. There is no age limitation placed upon either the male or the female, and the statute defines and is intended to apply to abduc-

tion or seduction only, without embracing or including the crime of fornication, which is defined by Section 2077, L. O. L., under which the defendant was indicted.

The court instructed the jury:

That "the burden of proof is upon the state to satisfy you beyond a reasonable doubt of the truth of each material allegation of the indictment"; that "the essential elements of this crime are that it was committed in the county of Multnomah, State of Oregon; that the defendant was a male person over the age of eighteen years; that —— [the prosecuting witness] was a female person over the age of sixteen years and under the age of eighteen years, and that she was a female person of previous chaste and moral character; that she was not the lawful wife of W. E. Mallory, and that W. E. Mallory carnally knew the said —— [prosecuting witness] in manner and form as alleged in the indictment. And in addition, that such carnal knowledge was not a forcible ravishing of the said —— [prosecuting witness], because that would constitute the crime of rape, which is excluded by this indictment."

2. While the proof is conclusive that the girl was chaste, the defendant contends that there was no testimony that she had a "moral character" and it is true that there is no specific evidence on that subject. Where, as in this case, there is an age limitation, there is a conflict in the authorities as to the burden of proof on the question of the moral character of the complaining witness. Many of the states, including Iowa and Michigan, hold that "it is presumed that the female was of previous chaste character, or virtuous, at the time of the seduction, and that the burden of proving unchaste character or want of virtue, is on the accused": 35 Cyc. 1344, and authorities there cited. It also appears from the record that

the question as to the want of such proof by the state was not called to the attention of the trial court and that it was not pointed out in either of the motions for a directed verdict, and it is contended by counsel for the state that the question cannot be raised for the first time in this court, and should not be considered. Under our view, the decision of each of such questions is unnecessary to this opinion.

The testimony is undisputed that the girl in question was born and reared in the country, on a farm; that she had always lived at home with her parents, had attended high school at Milwaukie for two and one-half years, and was dutiful and obedient, and it is conclusive that she was of chaste character. On the question of the previous chaste character of the female, 1 C. J. 297, lays down this rule:

"It is apprehended that from the nature of the subject the more accurate statement of the rule is that, although it may be necessary to prove the fact, evidence directly upon the point is not necessary, but the fact may be shown *prima facie* by presumption from other facts and circumstances, as that the unmarried female was at the time residing with her parents or guardian or in some respectable household, or by proof of other like circumstances consistent with and the usual concomitants of chaste female character."

The girl appeared and testified before the trial court, which fully submitted the question of her "moral character," and the jury found the defendant guilty. After verdict under such a state of facts, we hold as a matter of law, that there was evidence from which the jury could find that the girl was of moral character.

3. It is next contended that it appears from the evidence that the crime, if it was committed, was rape and not fornication. Section 1912, L. O. L., provides that

"if any person over the age of sixteen years shall carnally know any female child under the age of sixteen years, or any person shall forcibly ravish any female, such person shall be deemed guilty of rape, and upon conviction thereof shall be punished," etc.

The original statute was enacted in 1864. The age of consent was raised and the present statute enacted in 1895. It will be observed that under this statute the age of consent is sixteen years and that in the instant case the testimony is undisputed that the girl was seventeen years old at the time of the commission of the crime charged in the indictment. The act further provides for the punishment of "any person" who "shall forcibly ravish any female."

Under the above instructions the jury was advised that it was one of the essential elements of fornication that—

"such carnal knowledge was not a forcible ravishing of the girl in question, because that would constitute the crime of rape, which is excluded by this indictment."

In legal effect the jury was instructed that if the acts of the defendant constituted rape he should be acquitted of the crime charged. No other instructions were requested on this point, and we must assume as a fact that the jury found the acts of the defendant did not constitute rape. There is abundant evidence to support that finding.

4. Section 1540, L. O. L., is as follows:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime, or the circumstances of the commission."

It is contended by the defendant that the girl was an accomplice and that there is no corroboration of her testimony as to the overt act. If it is true that, as stated in the bill of exceptions, "there was no corroboration of her testimony to the effect that the defendant had had such intercourse," no corroboration is required by the provisions of Section 2077, L. O. L. under which the defendant was indicted.

We adopt the rule laid down in 1 Blackstone, 86, cited by counsel, where it is said:

"There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy."

The original seduction and rape statutes were enacted in 1864 and the present rape statute, which is an amendment of the original act, was passed in 1895. The fornication statute was enacted in 1905. It is very apparent that the purpose and intent of the amendment of the rape statute and the enactment of the fornication statute were to protect further the purity and chasity of innocent maidens; that the mischief was the fact that male persons over the age of eighteen years did have carnal knowledge of female persons of previous chaste and moral character, over the age of sixteen and under the age of eighteen years, who were not their wives; and that the remedy was to prohibit and make it a crime for such male persons to have carnal knowledge of such female persons, and to make the punishment fit the crime.

Again, it was not a matter of choice with the defendant to say for which crime he should be indicted. That was for the grand jury.

As to accomplices, the rule is thus laid down in 16 C. J. 672:

"As a criminal intent is the essence of all criminal liability, one who, although he may have been in fact a participant in the commission of a crime, acted without any criminal intent, cannot be regarded as an accomplice."

The rule is thus stated in 1 McClain, Crim. Law, Section 199:

"Where a penal statute is intended for the protection of a particular class of persons, one of that class does not become an accomplice by submitting to the injury."

The latter authority is cited with approval by Judge GILBERT of the United States Circuit Court of Appeals, Ninth Circuit, in the leading case of *Diggs* v. *United States*, 220 Fed. 545–553 (136 C. C. A. 147). On the question of volition and intent 1 R. C. L. 168, says:

"In order to constitute one an accomplice, he must knowingly, voluntarily and with common intent with the principal offender unite in the commission of the crime."

In the instant case the statute was designed for the further protection of the chastity of female persons within a specified age, and by its very terms such a girl is exempt from and could not be indicted for the crime with which the defendant is charged. In legal effect this brings the question within the principle laid down by this court in the case of *State* v. *Busick*, 90 Or. 466 (177 Pac. 64). We hold that the complaining witness was not an accomplice of the defendant. Taking her testimony as true, there was an entire absence of

criminal intent on the part of the girl, and she was not conscious of the fact that a crime was being committed. She was the betrayed victim of her trusted medical adviser.

Speaking from the record, the complaining witness had a goiter and menstrual trouble, and, acting under the advice of her parents, was in search of medical relief. At the suggestion of personal friends she went to the defendant's office, accompanied by her parents, by whom the defendant was employed and paid in advance for his professional services. On his statement that the girl's condition was improving, the treatments were continued after the original contract had expired. As a rule, on her visits to the defendant's office the girl was accompanied by her mother, but on this occasion her mother went to Milwaukie to assist in Red Cross work and the girl went to the office alone.

Concerning her treatments before that day, the girl testified:

"Q. During that time did you ever have any conversation with him? Did you talk with him generally about your condition and the effect of these treatments?

"A. Every once in a while he would ask me questions and I thought it was all right for him to ask me those questions because he was a doctor, and he used to ask me how I felt and such things as that, but I never thought that was out of the ordinary, but what a doctor would ask."

Speaking of the last visit, she testified:

"And the very first thing he asked me was 'Did you come alone?' And I told him 'Yes,' and he said, 'Well, where is your mother?' I says, 'Well, I left her out to Milwaukie to sew for the Red Cross. She went to the schoolhouse there to sew for the Red Cross.' "

"Q. At that time did you think anything out of the way?

"A. No. I thought he was just the same as he always was, and I never thought anything about it. I supposed he was to be trusted."

She testified that after she had removed her clothing and he had locked the doors, during the time he was engaged in giving her what is known as a massage treatment:

"Well, then he says, 'Would you care if I did something for your own good?' and he says, 'It won't hurt you much and I will treat you as if you were my own daughter.' And he says, 'It is the only way you can get well.'"

We are not disposed to give further details. Accepting her story as true, as we must for the purpose of this opinion, the girl went into the defendant's office pure and undefiled and came out betrayed by her physician under the sham and false pretense that it was necessary to her physical recovery and that he would treat her as his own daughter.

Blackstone, 86, says:

"It is the business of the judges so to construe the act as to suppress the mischief and advance the remedy."

After a careful examination of all of the legal questions presented by learned counsel, we are convinced that the defendant had a fair trial and that in the interests of justice the judgment of the Circuit Court should be affirmed. AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued April 9, reversed April 22, 1919.

MULTNOMAH COUNTY *v.* UNITED STATES FIDELITY & GUARANTY CO.

(180 Pac. 104.)

Highways—Improvement—Contractor's Bond—Construction.

1. Where highway contractor's bond is executed under Section 6266, L. O. L., as to public contractor's bond, the statute should be read in and become a part of the bond.

Courts—Rules of Decision—Stare Decisis.

2. Where law laid down by decision of the Supreme Court construing public contractor's bond executed under Section 6266, L. O. L., has been in force and effect for more than a year, during which time many similar bonds have been written, the case has become *stare decisis*.

Highways—Improvement—Construction of Bond—"Labor."

3. Highway contractor's bond executed under Section 6266, L. O. L., and conditioned upon his making prompt payment to all "persons supplying him * * labor * * for any prosecution of the work," *held* to include payment to owner of horses for services of horses in prosecution of the work; such services constituting "labor."

[As to who is within the meaning of statutes relating to laborer, workman or servant, see note to 32 **Am. Rep.** 264.]

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2.

On January 27, 1916, plaintiff filed its complaint against the defendants in the Circuit Court of Multnomah County, and after the necessary corporate allegations avers that about January 21, 1915, the defendant, Pacific Bridge Company, entered into a written contract with the plaintiff, Multnomah County, for the improvement of that portion of the Columbia River Highway known as Section D, in accord with the plans and specifications therefor, in and by which the contractor agreed "to furnish all materials, tools and equipment and all labor necessary to complete the work."

The complaint alleges that pursuant to said contract "and in accordance with the laws of the State of Oregon" the defendant Pacific Bridge Company, as principal, and United States Fidelity & Guaranty Company, as surety, executed to Multnomah County its certain penal bond, conditioned "that Pacific Bridge Company should promptly pay all laborers, mechanics, subcontractors and materialmen, and all persons who should supply such laborers, mechanics, subcontractors or materialmen with supplies or provisions for carrying on such work"; that the Pacific Bridge Company "entered upon the work of carrying out said contract and making said improvement in accordance therewith"; that it sublet a portion of said work to Thomas A. Sweeney or contracted with him to furnish teams and equipment to haul materials to be used and which were used in the work of carrying out said contract; and that during the months of August, September, October and November of 1915, R. J. O'Neil, for whose use and benefit this action was brought, furnished and supplied Sweeney with certain horses, pursuant to an agreement with him that he should keep the horses "in a camp established by him on said improvement work, assume the cost of feed and hire drivers for the same, and pay in addition to the said R. J. O'Neil the reasonable value of the labor performed by said horses in the work of teaming or hauling said materiads for use in said improvement." It is further alleged that "the reasonable value of the labor so furnished and supplied by said R. J. O'Neil by said horses was the sum of $315," no part of which has been paid; that the full amount thereof is due and owing to the said O'Neil, and that prior to the commencement of the action he made the necessary proofs and furnished the required affidavits

which gave him the right of action. A copy of the bond and a copy of the contract between the Bridge Company and Multnomah County are attached to the complaint as exhibits and made a part thereof.

The defendant filed a demurrer upon the ground:

"That said complaint does not state facts sufficient to constitute a cause of suit or action against the defendants herein or either thereof."

On February 21, 1916, the trial court sustained the demurrer and dismissed the action and rendered judgment against the plaintiff for costs, from which ruling the plaintiff appealed, claiming that the court erred in sustaining the demurrer to the complaint, and that is the only question presented on the appeal.

REVERSED.

For appellant there was a brief over the names of *Mr. R. J. O'Neil* and *Mr. W. B. Gleason,* with an oral argument by *Mr. O'Neil.*

For respondents there was a brief over the names of *Mr. David E. Johnson Wilson* and *Messrs. Clark, Skulason & Clark,* with an oral argument by *Mr. Wilson.*

JOHNS, J.—The action is founded upon Section 6266, Lord's Oregon Laws, which provides as follows:

"Hereafter any person or persons, firm or corporation, entering into a formal contract with the State of Oregon, or any municipality, county, or school district within said state, for the construction of any buildings, or the prosecution and completion of any work, or for repairs upon any building or work, shall be required before commencing such work, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor

or contractors shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contracts"; etc.

The statute was enacted in 1903 and is entitled:

"An act to protect subcontractors, materialmen and laborers furnishing material for doing work upon public buildings, structures, superstructures or other public works": Laws 1903, p. 256.

1. Under the rule of construction, this statute should be read into and become a part of the bond.

In the case of *Multnomah County* v. *United States Fidelity & Guaranty Co.*, 87 Or. 198 (170 Pac. 525, L. R. A. 1918C, 685), an action was brought by the county against the defendant, for and on behalf of L. H, McMahan, against the same defendants here for the use of a caterpillar engine which it is alleged that McMahan hired to Sweeney and for the use of which he agreed to pay $10 per day. There, as here, a general demurrer was filed to the complaint and sustained by the trial court upon the theory that the use of the caterpillar engine did not come within the terms of the bond. That ruling was reversed by a decision of this court, written on January 22, 1918, by Mr. Justice BEAN.

2. The law of that case is vigorously attacked by respondent, but it has been in force and effect for more than one year, and it is a matter of common knowledge that in the ordinary course of business many such bonds have been written in that time and the decision must have been known and acted upon at the time of their execution, and that case should now be *stare decisis*.

The purpose of the act was to protect all persons supplying "labor or materials for any prosecution of

the work provided for in such contract" and there is much stronger reason for holding that the use of horses comes within the meaning of the word "labor" as used in the act than the rental of a caterpillar engine employed on the work. A caterpillar engine is a machine; a horse is a domestic animal with some degree of intelligence.

The respondents have cited definitions from Words & Phrases and the New Standard Dictionary as to the meaning of the words "labor and material" and of the word "labor," but Century Dictionary defines the word "labor" as "work done by a human being or an animal," and Words & Phrases, Volume 5, page 3951, says:

"Within the meaning of a statute giving a lien to 'laborers and for persons furnishing materials to contractors or subcontractors' labor done by a man's team may be fairly regarded as labor done by him, no right arising to anyone out of its services except to him," citing *Chicago N. E. R. Co.* v. *Sturgis*, 44 Mich. 538, 541 (7 N. W. 213, 214).

The opinion in that case says:

"But the labor done by a man's team may be fairly regarded as labor done by him within the meaning of this statute."

The same authority also cites the case of *Hogan* v. *Cushing*, 49 Wis. 169 (5 N. W. 490, 491), in which the syllabus says:

"The 'labor and services' for which Chapter 95 of 1877 gives a lien upon logs, are not merely the personal manual labor and services of the claimant, but include those performed by his teams and servants."

3. If O'Neil in person or through his own employees had used his horses in the "prosecution of the work" there would be no question about his right to recover

for the joint services of both horses and men. On legal principle, the same rule should apply where he hired out his horses to another to be used and they were so used. We hold that the word "labor" within the meaning of the act should be construed to include the services which the horses performed in the "prosecution of the work."

Judgment is reversed. REVERSED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Motion to dismiss submitted April 18, appeal dismissed April 22, 1919.

CURRIN *v.* CROWN-WILLAMETTE PAPER CO.

(180 Pac. 106.)

Appeal and Error—Failure to File Brief Within Time—Dismissal of Appeal.

1. Where no brief was filed by appellant within twenty days after service of copy of abstract, as required by Rule 8 (173 Pac. viii), and no reason is advanced for the delay, appeal will be dismissed on motion of respondent.

On motion of respondent to dismiss appeal.

APPEAL DISMISSED.

Mr. George C. Brownell and *Mr. Joseph E. Hedges,* for the motion.

Messrs. Griffith, Leiter & Allen, Mr. Frank J. Lonergan and *Mr. Chester Sheppard, contra.*

PER CURIAM.—This is a motion to dismiss the appeal. Defendant gave notice of its appeal and filed its transcript here on March 7, 1918, and filed its abstract April 8, 1918. No brief having been filed plaintiff, on November 20, 1918, served and filed this motion

to dismiss the appeal, for failure on the part of the defendant to comply with Rule 8 of this court 89 Or. 713 (173 Pac. viii), which requires the appellant to file a brief within twenty days after service of a copy of the abstract. No brief was filed by appellant until February 12, 1919, and no reason is advanced for the delay.

The appeal is dismissed. APPEAL DISMISSED.

Argued April 10, reversed April 29, 1919.

BURCH *v.* CITY OF AMITY.

(180 Pac. 312.)

Municipal Corporations—Streets—Suit by Property Owner—Burden of Proof.

1. Defendant city having denied plaintiff's allegations, *held*, that the burden of proof was on plaintiff property owner to establish that there was a public road or highway running through defendant city between certain blocks as shown on the recorded plat of the city, that the portion of the road within the city limits was known as Nursery Street, that plaintiff's property formed the north line of such road, and that what was within the city known as Nursery Street was in fact a county road.

Evidence—Judicial Notice—Location of Buildings.

2. The Supreme Court cannot take judicial notice of the former existence or respective locations of a certain schoolhouse and church or old meeting-house, or of a certain tavern.

[As to judicial notice—Boundaries, see note in 82 Am. St. Rep. 445.]

Municipal Corporations—Streets—Identity With County Road—Sufficiency of Evidence.

3. In suit by a property owner against the city to prevent enforcement against the property of a lien for straightening the line of the street on which it abutted, evidence *held* insufficient to show the location of the old county road which plaintiff alleged was coterminous with the street in the city.

From Yamhill: HARRY H. BELT, Judge.

Department 2.

The defendant is a municipal corporation. It is alleged in paragraph 2 of the complaint and admitted that the plaintiff is the owner of "the west half of the east half of Block 11 in Amity, according to the plat thereof on file in the county clerk's office in Yamhill County." In clause 3 it is alleged in substance and denied that for more than fifty years a public road has existed through the City of Amity, passing between Blocks 4 and 11 of the original town of Amity, as shown upon the recorded map thereof, and that this portion of the county road within the city limits "is sometimes, for convenience, termed Nursery Street." The county road running north and south through Amity is sometimes known as Trade Street, "but running east from Trade Street is commonly known as Nursery Street within the limits of said corporation; that the property of this plaintiff forms the north line of said county road known within the limits of said municipality as Nursery Street, and that which is thus known as Nursery Street is in fact the county road, which is now and has been for more than fifty years used as a sole communication between points in and about Amity," etc. As to paragraph four of the complaint, the defendant "admits that the property of the plaintiff forms the north line and abuts upon Nursery Street in the City of Amity, Yamhill County, Oregon," but denies each and every other allegation. In paragraph six it is alleged:

"That said county road within said true city limits known as Nursery Street is subject to the control of the State of Oregon and under the jurisdiction of the County Court of the State of Oregon in and for Yamhill County; that said defendant has attempted to exercise jurisdiction over said road known as Nursery

Street and particularly that portion thereof fronting along the property of this plaintiff."

The defendant admits that it "has exercised jurisdiction over said Nursery Street" and specifically denies all other allegations of paragraph 5. Paragraphs 7, 8, 9, 10 and 11 set out the alleged proceedings of the City of Amity by which it undertook to straighten the boundary line of Nursery Street and create a lien upon plaintiff's property for her *pro rata* share of the expense, all of which is substanially admitted by the defendant. In paragraph 12 it is alleged:

"That neither the State of Oregon nor the county of Yamhill by legal or other means has turned the control or ceded the control or jurisdiction of said county road, or any portion thereof, to the said City of Amity, and that said municipality had no right to improve the same (being said portion known also as Nursery Street) or change or assess any costs against the adjacent property or otherwise," etc., and that "said municipality had no jurisdiction or control thereof."

The defendant specifically denies the allegations of paragraph 12.

As a further and separate answer the defendant city alleges its incorporation and says that the plaintiff "ought not to be admitted to plead her said complaint or allege or say that the said Nursery Street described in her complaint is not a street of the City of Amity" by reason of the fact that on the seventh day of February, 1859, J. B. Walling *et ux.*, through whom plaintiff deraigns title, filed and recorded a plat of the City of Amity and designated one of the streets thereon as Nursery Street, and that plaintiff, with others, acquired her title with reference to said plat, and in December, 1897, joined in the execution of a

deed to Lot 4 in Block 4 as the same appears upon said plat, and as a further and separate answer pleads the proceedings of the city council authorizing such improvements and the creation of such alleged lien.

To the further and separate answers of the defendant, plaintiff filed a reply in which she made specific denial of the matters therein alleged.

After the testimony was taken the trial court made findings of fact and conclusions of law and rendered a decree in favor of the plaintiff to the effect that the proceedings of the city were null and void and that its officers and agents should be enjoined from entering or enforcing any lien for the improvements and that such alleged lien was null and void, and for the costs of the suit; from which decree the defendant appeals, assigning numerous errors, among which it is claimed that "the court erred in finding that Nursery Street in the City of Amity was a county road running through the City of Amity"; that "said court erred in finding that the said Nursery Street was subject to the control of the State of Oregon and under the jurisdiction of the County Court of the State of Oregon in Yamhill County"; that "said court erred in finding that the City of Amity had no jurisdiction over Nursery Street"; that "said court erred in finding that no legal dedication was ever made of said Nursery Street"; and that in general the court erred in deciding that the city did not have jurisdiction of the subject matter, that the proceedings were void and that the plaintiff was entitled to any relief. REVERSED.

For appellant there was a brief over the names of *Messrs. McCain & Vinton* and *Mr. Virgil H. Massey,* with an oral argument by *Mr. Vinton.*

For respondent there was a brief and an oral argument by *Mr. Frank S. Grant.*

JOHNS, J.—1. The defendant having denied such allegations, the burden of proof is upon the plaintiff to establish by the evidence that there was a public road or highway running through the defendant city between Blocks 4 and 11 on the north and Blocks 5 and 10 on the south, as shown upon the recorded map or plat of the town; that

"that portion thereof which is within the city limits is known or termed as Nursery Street; that the property of plaintiff forms the north line of said county road known within the limits of such municipality as Nursery Street; and that which is there known as Nursery Street is in fact the county road, which is now and has been for more than fifty years used as a county road."

Thomas B. Jackson, a witness for the plaintiff, testified that he had lived in Amity from 1851 to 1870 and that he was familiar with the county roads in and around Amity.

"Q. Now, Mr. Jackson, you know where the public square is in Amity?

"A. Well, I can't say that I do. We didn't recognize any public square there when I lived there.

"Q. Do you know where the Walling Tavern used to be?

"A. I do, yes.

"Q. Now, the thoroughfare running between where the schoolhouse and the old meeting-house used to be and the Walling Tavern, what was that?

"A. That was the road from Amity to Matheny's Ferry, that is the one running east and west, running between the schoolhouse and the Walling Tavern; the Walling Tavern property was on the north side of the road and the church and schoolhouse were on the south side of the road.

"Q. Is the road that you were over this morning identical or similar to the road you traveled in 1851 to 1859?

"A. I regard it as identically the same road."

Phoebe Burch testified for the plaintiff that she lives in Amity and is eighty-two years old.

"Q. Do you know—can you say whether or not the road or passageway running between the schoolhouse and where the old tavern used to be—you know that road leading to Matheny's Ferry?

"A. Yes.

"Q. How long has that been traveled, to your recollection?

"A. It has been traveled all my life you might say, ever since I have been there.

"Q. Was it known as the county road?

"A. Yes, sir.

"Q. Now, did this road go through what he laid out as the town of Amity? Did the road run though it? Was the land he platted on both sides of this road or was it?

"A. Yes."

Three different plats were introduced in evidence, the first of which purports to be "a plat of the Town of Amity in Yamhill County, Oregon Territory, filed of record February 7, 1859," consisting of fourteen blocks, of four lots each, without the names or width of any streets or any information as to where the ground is located. The second was filed for record September 1, 1890, and apparently embraces the same and adjoining lands, designates the streets thereon, and locates Nursery Street as running east and west and lying between Blocks 4 and 11 on the north and Blocks 5 and 10 on the south of the original plat, but it does not appear from the map that any of said lands are tied to a government corner or that their exact location is described by any specific survey. The third

was filed May 11, 1899, and for the first time the lots and blocks are tied to a government corner and defined by an actual survey, but there is nothing on either of said plats which shows or would tend to show where the schoolhouse, the church or old meeting-house, or the Walling Tavern were ever located. No reference is made to any one of them on either of the plats and there is no testimony in the record as to where either of them was located.

2. This court cannot go outside of the record, and while the witnesses and the litigants may know where the schoolhouse, the church or old meeting-house, or the Walling Tavern were situated in the town of Amity fifty years ago, the court cannot take judicial knowledge of their former existence or respective locations, and, in the absence of testimony, would not have any judicial knowledge of where either of them was ever located.

3. Assuming, without deciding, that there was an old county road somewhere within the corporate limits of the defendant city, without proof of such landmarks there is no evidence on the part of the plaintiff as to where the road was actually located or as to whether it would cover or include the same or any portion of the land known and described as Nursery Street.

While it is true there is some testimony on the part of the defendant tending to show the existence of an old county road somewhere within the corporate limits of the town, yet its exact location is a matter of conjecture and speculation, upon which a court could not render a decree.

The decree is reversed, neither party to recover costs in either court. REVERSED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Motion to dismiss appeal denied September 25, 1917, argued on the merits March 21, affirmed April 29, 1919.

TOKAY HEIGHTS DEVELOPMENT CO. *v.* HULL.

(167 Pac. 577; 180 Pac. 314.)

Appeal and Error—Undertaking—Service—Evidence.

1. Notice of appeal was served and filed in the Circuit Court on July 28th. On August 1st an undertaking was filed, with the certificate of the return of the sheriff indorsed thereon, to the effect that it was received on July 31st, and served on respondent August 1st, together with a copy of the notice of appeal. The sheriff while making an affidavit that he served no papers pertaining to the appeal, after service of notice of appeal on July 28th, deposed that on July 28th appellants' attorney placed in his hands some papers relating to the appeal for service, and that he immediately served the same, and that, if an undertaking was delivered to him, he served it. Affidavits of the agent of the surety on the undertaking and witnesses showed that it was signed July 28th, although it erroneously bore the date July 30th, and that it was delivered to the sheriff for service on July 28th. *Held*, that the return of service of the undertaking, being of record, was sufficient, as it was not overcome by the affidavits.

Appeal and Error—Review—Merits.

2. On a motion to dismiss defendants' appeal, a question as to their dealing with the property in suit involves the merits, and cannot be considered.

ON THE MERITS.

Mortgages—Sale of Land—Representations—Means of Knowledge.

3. Where defendants, before making a contract for land, had received and relied upon favorable statements of their friend, this amounted to making an independent investigation, and where the means of knowledge were at hand for defendants' inspection during a period of three years between the original contract and the new contract embodying the note and mortgage sought to be foreclosed, defendants are not entitled to relief on the ground of fraudulent representations.

Appeal and Error—Review—Findings of Trial Court—Conclusiveness.

4. Findings of the trial judge upon the defense of fraudulent misrepresentations of the quality and character of lands sold, based on evidence of witnesses who testified before the judge, resulting in a substantial conflict with respect to material issues, must be given great weight, particularly where the judge visited and inspected the premises.

From Josephine: FRANK M. CALKINS, Judge.

On respondent's motion to dismiss appeal. MOTION DENIED.

Mr. O. S. Blanchard, for the motion.

Messrs. Blanchard & Blanchard and *Mr. Alfred E. Reames, contra.*

In Banc.

BEAN, J.—The plaintiff moves to dismiss this appeal for failure to serve an undertaking. The defendant moves to correct the return of the sheriff to show the true date of the service of a copy of the undertaking on appeal. A decree was rendered on June 2, 1917. On July 28th, notice of appeal was served and filed in the Circuit Court. On August 1st, an undertaking on appeal was filed with the certificate of the return of the sheriff indorsed thereon to the effect that the same was received by him on July 31, 1917, and served upon the respondent company on August 1, 1917, together with a copy of the notice of appeal. The transcript was filed in this court on August 30, 1917, containing a copy of the decree appealed from, the notice of appeal with return of service thereof, and a copy of the undertaking with no proof of its service. On August 31st, and within the time allowed for filing the transcript herein, a copy of the undertaking on appeal with the return of service by the sheriff indorsed thereon was filed in this court.

1. It is the contention of the respondent that the undertaking on appeal was never served and that the transcript was prematurely filed before any such service. The sheriff makes affidavit on behalf of the plaintiff that he served no papers in the case pertaining to the appeal after the service of the notice of

appeal on July 28, 1917, and that no undertaking on appeal was served by his office on August 1, 1917, or at any time. For the defendants the sheriff makes a further affidavit in explanation and to the effect that on July 28, 1917, Paul E. Blanchard, attorney for defendants, placed in his hands some papers relating to this appeal for service upon the plaintiff; that he does not remember what they were, and that he immediately served the same; that if an undertaking on appeal was given him he served it. It is shown by the affidavits of Paul E. Blanchard, of the agent of the surety company who signed the bond, and of two witnesses thereto, that the undertaking on appeal was signed on July 28, 1917, although it bears the erroneous date of July 30th, which was the cause of an error as to date in the return of service of the same. Mr. Blanchard further deposes that he placed copies of the notice of appeal and undertaking in the hands of the sheriff on July 28, 1917, for service upon the plaintiff. The return of the sheriff of the service of the undertaking on appeal is not overcome or refuted. The proof of service is of record and is sufficient.

2. The motion also relates to the dealing of the defendants with the property involved. This matter pertains or is closely related to the merits of the case and should not now be considered. The motion to dismiss is denied and the defendants allowed to correct the return of the sheriff as to the date of service of the undertaking on appeal. MOTION DENIED.

Affirmed April 29, 1919.

ON THE MERITS.

(180 Pac. 314.)

Department 1.

The plaintiff instituted this suit to foreclose a mortgage given to it by the defendants upon certain subdivisions of a property laid out by the plaintiff adjoining Grants Pass in Josephine County. The giving of the note and mortgage in question is practically admitted but the defendants contend in substance that on account of certain fraudulent representations they allege were made by the plaintiff, which are more fully hereinafter set forth, those instruments are void and nothing is due upon them. The essence of the defense is that the defendants were residing in Kansas City, Missouri, in October, 1911, and contracted with the plaintiff, which had a local office there, to buy certain lots in the tract mentioned, now subject to the mortgage in question; that afterwards they agreed to buy other lots and still later took deeds for the property and gave to the plaintiff two notes and mortgages, one set of them being that in suit. They charge that the only object they had in acquiring any of the premises was to use them for the purpose of growing commercially certain varieties of pears, which were then planted on the land, and about an acre of grapes, then also planted. It is admitted by the defendant Hull in his testimony that the lots he contracted for in October, 1911, were not set to trees at that time but were afterwards planted to different varieties of his own choosing. They say:

"That in order to successfully grow said varieties of fruit it was necessary, and the defendants believed

it to be necessary, that the soil upon which said fruit was to be grown should be exceedingly fertile and rich and of great depth, and suitable for the growing of the fruits of the varieties named, all of which facts were at all the times herein mentioned well known to the plaintiff."

Further averments of fraud appearing in the answer are here set down:

"That in order to induce the defendants to purchase said premises the plaintiff then and there on and prior to October 31, 1911, falsely and fraudulently represented to the defendants that all of said premises were of the character of land above described, and had been, under the advice of those possessing scientific knowledge upon said subject, planted to said varieties of fruit. And as a part of said transaction and with said fraudulent intent and purpose the plaintiff falsely represented to the defendants that that portion of said premises known as valley lands, was a black loam, and that portion of said lands which was sloping was a red shot soil, and that all of said lands were of great depth and inexhaustible fertility and were especially adapted to the growing of said fruits. That each and all of said representations so made for said purpose were false, fraudulent and untrue, in this: that not more than four acres of said lands known as valley lands, out of 20 acres thereof, were black loam and none of the said sloping lands were what is known as red shot soil; nor were any of said lands of great depth or great fertility; nor were any of the same of sufficient depth or fertility for the proper growing of said varieties of fruit; all of which facts were at all the times herein mentioned, well known to the plaintiff.

"That at said time and as a part of said transaction and for the purpose of inducing the said defendants to purchase said premises, the plaintiff falsely and fraudulently represented to the defendants that the said purchase price of said premises, respectively, was much lower than the real value of said premises and that if the defendants purchased the same, they would

within three years after such purchase make a profit upon said transaction of 300 per cent, all of which representations were not only false and untrue, but were known to the plaintiff at the time they were made to be false, fraudulent and untrue, in this: that the purchase price of said premises, respectively, was greatly in excess of the true value thereof; that said premises were not adapted to the growing of the varieties of fruits to which the same were planted, and for which they were purchased, and said premises could not be operated at any profit, or other than at a loss, all of which facts were, at all the times herein mentioned, known to the plaintiff. That as a part of said transaction and in order to induce said defendants to purchase said premises the plaintiff falsely and fraudulently represented to the defendants that if they would purchase said premises at said prices said investment would increase in value within three years to the amount of 300 per cent without the expenditure of any additional money or the making of any additional improvements thereon, which statement was false, fraudulent and untrue and was known by the plaintiff at the time the same was made to be false, fraudulent and untrue."

As their principal grievance they charge in substance that the soil on all the premises is shallow, that a considerable portion of it is underlaid with solid bedrock covered with a soil ranging in depth from two to ten inches while other portions are said to be composed of hard-pan impervious to water and covered with a soil ranging from twelve to eighteen inches in depth. They say that in order to plant the premises to orchard the plaintiff found it necessary to use powder for the purpose of blasting holes in which to plant the trees, which facts were not known to the defendants until the summer of 1916. They claim not to have discovered the falsity of the alleged representations until the summer of 1916, when they ten-

dered a deed reconveying the property to the plaintiff and demanded the return of the money they had paid and the value of certain lands in Kansas City which they had conveyed in part payment of the purchase price of the lands in controversy.

The charges of fraudulent representation are denied by the reply. That pleading admits the use of the powder for the purpose of blasting holes in part of the land but says that fact was known to the defendants in the fall of 1911. This knowledge is established by unchallenged written testimony.

The Circuit Court heard the case; the trial judge made two personal examinations of the premises; and after full hearing made a decree denying relief to the defendants and foreclosing the mortgage substantially as prayed for in the complaint. The defendants appealed. As the defendant, Daniel Hull, appears to be the sole actor on behalf of himself and wife the opinion, for convenience of designation, will be written as if he were the only defendant.

Affirmed.

For appellants there was a brief over the names of *Mr. Alfred E. Reames* and *Messrs. Blanchard & Blanchard,* with an oral argument by *Mr. Reames.*

For respondent there was a brief over the names of *Mr. H. D. Norton* and *Mr. O. S. Blanchard,* with an oral argument by *Mr. Norton.*

BURNETT, J.—We note at the outset that the first contract for the purchase of the property was made October 31, 1911. The mortgage which the plaintiff would foreclose in this suit was dated April 1, 1915. The testimony shows that the defendant was engaged in teaching in Kansas City and owned and resided

upon a five-acre tract there, which was mainly covered with orchard which he personally superintended. He had read considerably on the subject of soils and orchards, all of which left him no tyro as a horticulturist. He had a friend named Hart who traveled extensively in the northwest looking for orchard lands and examined various parcels of realty supposed to be adapted for horticulture and personally inspected the property of the plaintiff which it had laid out to sell for orchard tracts. He gave it thorough, independent investigation, and, returning to Kansas City, informed Hull that it was the best proposition he had seen in all his journey. The plaintiff had a branch office in that city so Hull secured from it a printed circular describing the whole property of the plaintiff. The statements in that document cover everything which the defendants rely upon as fraudulent. After a glowing description of the Rogue River Valley and the statement that "Tokay Heights," comprising 160 acres, adjoins the city limits of Grants Pass and lies on a gradual southwesterly slope, it makes the following statement:

"Our valley land is a black loam of great depth and inexhaustible fertility. The sloping ground is of the rich, red shot variety so desirable for certain fruits such as Bartlett and D'Anjou pears, Tokay grapes, peaches, cherries, English walnuts, etc., but while the different soils are each particularly adapted to certain cultures any acre on our tract will produce almost any variety of fruit or vegetable. On the advice of several expert horticulturists we have decided that for commercial purposes we shall plant Bartlett and D'Anjou pears and Tokay grapes and around each building site, for family use, an assorted variety of cherries, peaches, apples, etc. However, we shall be pleased to plant whatever varieties of trees the individual customer may select on tracts not already set out at time of purchase."

Other statements here follow:

"We offer you acres adjoining the city limits for less than you can buy other acres several miles from town. You have two sure sources for enormous profit; as your orchard grows it becomes valuable; as the city grows Tokay Heights will become the choicest residence district. If you buy a tract and forget you have it, it should make you 300 per cent in three years. If you live on Tokay Heights you have the double advantage of city and country, a self-supporting home with magnificent surroundings."

After making the contract in Kansas City in October, 1911, the defendant came to Oregon unannounced and going to Grants Pass went upon the premises and gave them personal examination. He was so well pleased with the prospect that he wrote many letters to his friends in Missouri urging them to purchase property in the same tract. He also contracted for additional acreage there. Still later he secured a position in the public schools of Grants Pass, within three fourths of a mile of the property, and had every opportunity to examine the premises. In fact, he afterwards took up his residence upon the property, and took active part in the care and management of the growing orchard. For instance, under date of July 3, 1912, in writing to the Kansas City agent of the plaintiff, Hull says:

"Tokay Heights is far the best young orchard I have seen. The trees show much greater growth than I thought possible in one year. Your brother has a gang of men and teams working among the trees every day, some cultivating, others pruning and spraying, so that the condition of the trees is fine. Among the trees potatoes, cabbage, melons and beans are growing and show the rich, fertile nature of the soil. Mr. Burke, the County Fruit Inspector, told me this Tokay Heights orchard is the best for its age in the county, and I have seen none better. I found the best

cherry, peach and grape ranches on the hill slopes. Right adjacent to Tokay Heights on the north is a three year old Tokay grape vineyard and each vine will average ten or twelve great bunches. All the north end of Tokay Heights above the ditch is rich, strong fruit land as well as sightly home sites. One great advantage of hillside orchards is immunity from spring frosts. They never have to 'smudge' as on the river bottom land. As you know, I have both hill and bottom lands and I am mighty well pleased with the selection we have made, in fact no mistake can be made in selecting from the Tokay Heights orchards without seeing them."

The letter proceeds in similar optimistic strain, but is too long for full rehearsal. With full opportunity for thorough examination of the premises, and after all the inspection he chose to make, without any hindrance or concealment on the part of the plaintiff, the defendant continued in his expressions of approval of the property through a long series of letters appearing in evidence.

At the trial substantially the entire effort of the defendant was to show that the greater part of the tracts were underlaid with hard-pan and that bedrock came very close to the surface in many places. Some experienced orchardists were called from Jackson County to examine the lands and gave it as their opinion that they were not suitable for commercial orchards. A larger number of other orchardists, some of them from Jackson County and others from the immediate neighborhood, gave it as their opinion that the lands were suitable for a commercial orchard, and some of them praised them as the best lands for the purpose in the Rogue River Valley.

The land, as Hull stated, is composed partly of what may be termed bottom land and partly of side-hill land The testimony shows, without dispute, that in planting

trees on the upper tracts powder was used in the bottom of the holes dug for planting so as to loosen up the underlying strata. This fact was communicated to Hull in the fall of 1911 and some witnesses declare it to be good practice in planting any orchard. The defendants contend that the bedrock in places crops out and at others is but a few inches below the surface on the side-hill part of the premises. The contention on the part of the plaintiff is that while it is true there are some outcroppings of bedrock, especially in the road, yet it was a condition readily observable under the most casual inspection. As to the hard-pan, the witnesses differ not only as to the fact of there being any hard-pan but also as to the effect it has, especially in the present instance.

The testimony for the defendants comes largely from witnesses who dug into the ground at various depths from twelve to thirty inches and came to a layer of hard ground which they denominated "hard-pan." The witnesses for the plaintiff described this stratum as penetrable by roots and moisture. One of them testified to having dug further in one of the test holes sunk by the defendants' witnesses and says he had no difficulty in removing the so-called "hard-pan" by aid of a shovel. Others testify that they found roots growing in that layer, that it was about eight or ten inches in thickness and that under it was good, rich soil. The testimony shows that originally the ground was covered with a rich growth of trees and underbrush which the plaintiff claims demonstrates that it was suitable for tree growth. It also produced testimony to the effect that its officers consulted with experienced orchardists respecting the availability of the site for horticultural purposes and that it was under such expert advice that the tract was laid out and exploited as good orchard ground. The testimony also

shows that thrifty orchards are growing on similar land adjacent to the premises. It is to be noted, in passing, that no fraud is charged as immediately affecting the execution of the mortgage in suit, but that the deceit charged is founded solely upon the representations of the printed circular, to which allusion has already been made, which the defendants claim directly induced them to enter into the original contract for the purchase. It is proper also to remember that an interval of three years and three months elapsed between the making of the contract and the taking of the conveyance and giving the return mortgage.

After giving evidence of the unfitness of the ground for orchard purposes much testimony was put in by the defendants to the effect that many of the trees were either dead or dying of what is called "sour sap." The witnesses on both sides are unanimous in saying that this condition is not peculiar to any class of land in Southern Oregon. It is no respecter of premises but appears alike on shallow and deep soils. Some of the witnesses for the defendants endeavored to account for it by defective drainage. We think the preponderance of testimony is to the effect that it may be ascribed to climatic conditions. It seems that when a sudden flow of sap is stimulated in a young tree either by warm rains, after it has lain dormant through a summer's drougth, or by warm weather in late winter or early spring, a succeeding spell of cold weather causes the sap to ferment and sour with the result that the new shoots perish. The root system is not necessarily disturbed at first and the tree may be saved in many instances by thoroughly cutting out the affected portions and allowing the root system to send up nourishment for the remainder and for such new growth as may appear. Of course orchards, especi-

ally in the earlier stages, are affected by cultivation, the lack of which will depreciate the plant. There is testimony to the effect that Hull's cultivation of his orchard was neglected and the photographs in evidence show orchards on adjoining lands which are growing well while the orchard of the defendants shows lack of care. It is stated in the report of the testimony also that the growing of potatoes in part of the orchard attracted gophers which remained to feast on the tender roots of the trees with fatal results to many trees without fault of the plaintiff.

Without going into detail, a perusal of the correspondence of the defendant Hull which is in the evidence shows that he started into the enterprise with roseate hopes; that he had ample opportunity to inspect the premises; that he did examine them and wrote in glowing terms of their excellence, and it was not until after the suit was commenced that he began to sink test holes and claims to have discovered the hard-pan and bedrock. His letters indicate that as time passed his visions grew less brilliant. He complains of long, dry summers, of lack of rain and other drawbacks preventing success, but does not intimate any hint of fraud until after the foreclosure suit was instituted.

The principal case cited by the defendants is that of *Vanderbilt* v. *Bishop,* 188 Fed. 971, in which Judge WOLVERTON had before him a case where the defendant in a suit for strict foreclosure of a contract to purchase an orchard in Hood River County set up by way of cross-bill misrepresentation and fraud on the part of the plaintiff and his agent, the essence of which is that in response to a direct question about whether or not there was hard-pan in the soil the plaintiff directly and specifically stated there was none, when the fact was otherwise. The case is different in its details

from the one before us, but we here repeat some principles of law announced in the cases quoted by the learned judge in his decision:

"The misrepresentation which will vitiate a contract of sale and prevent a court of equity from aiding its enforcement must not only relate to a material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation upon which he relied and by which he was actually misled to his injury. * * Where the means of knowledge are at hand and equally available to both parties and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say that he has been deceived by the vendor's misrepresentations. * * And the same rule obtains when the complaining party does not rely upon the misrepresentations but seeks from other quarters means of verification of the statements made and acts upon the information thus obtained": *Slaughter's Admr.* v. *Gerson,* 13 Wall. 379–383 (20 L. Ed. 627).

"If it appears that he, the purchaser, has resorted to the proper means of verification so as to show that he in fact relied upon his own inquiries or if the means of investigation and verification were at hand and his attention drawn to them, relief will be denied"—as cited by Mr. Justice BREWER in *Farnsworth* v. *Duffner,* 142 U. S. 43 (35 L. Ed. 931, 12 Sup. Ct. Rep. 164), quoting from *Ludington* v. *Renick,* 7 W. Va. 273.

Pomeroy's analysis of the subject is also set down by Judge WOLVERTON as follows:

"1. When, before entering into the contract or other transaction he actually resorts to the proper means of ascertaining the truth and verifying the statement. 2. When having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prose-

cuted with diligence. 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties."

In all such cases Pomeroy declares that a party will not be justified in relying upon representations made to him.

As stated by Mr. Justice Ramsey in *McFarland* v. *Carlsbad Sanatorium*, 68 Or. 530 (137 Pac. 209, Ann. Cas. 1915C, 555):

"In this state the rule is settled by a long line of decisions that an action of deceit based on fraudulent representations cannot be maintained unless the representations were false and either known by the person making them to be false, or were made by him recklessly as of his own knowledge without knowing whether they were true or not with the intent that they should be acted on by the party seeking relief and such party believed them to be true and acted upon them and was injured"—citing many Oregon precedents.

In *Wimer* v. *Smith*, 22 Or. 469 (30 Pac. 416), it is laid down as a rule that a party seeking relief on the ground of fraud perpetrated upon him by means of false representations must not only clearly prove the fraud but must also show that he relied upon the false representations, and although such false representations were made as alleged yet if, having full means of knowing the truth, he acted on his own judgment in the transaction from which he seeks relief he cannot complain.

3. In the present instance, before making any contract whatever, the defendants had received and relied upon the statements of their friend Hart, who gave favorable accounts of the country and of the particular tract. This amounts to making independent investigation. Not only so, but in addition thereto, before

giving the note and mortgage in suit, the defendant Hull visited the premises and afterwards had the opportunity of actual occupation and cultivation to observe the conditions. At all times he was afforded every opportunity to pursue his quest and no obstacle was thrown in his way by the plaintiff. This feature distinguishes the instant case from those cited by the defendants such as *Aitken* v. *Bjerkvig*, 77 Or. 397 (150 Pac. 278), where the seller took active measures to disarm the buyer's suspicion and prevent his independent investigation. The digging of test holes could have been accomplished on Hull's first arrival upon the premises as easily as after the suit had been commenced. The means of knowledge were at hand for his inspection during the whole period of three years between the making of the original contract and the execution of the new contract embodied in the note and mortgage in question.

It is not necessary to decide whether the plaintiff should plead laches as an estoppel or not. The letters and conduct of the defendant Hull are at least entitled to great weight as deliberate admissions made against his own interest. In brief, a careful perusal of the testimony convinces us that the charges of fraud are not sustained by a preponderance of the testimony. Without dispute, it is shown that the promoters of the original tract gave it thorough examination and took the advice of experts upon its availability for horticultural purposes. They saw the ample growth of original forest upon it; in clearing the same and blasting out the stumps they discovered that the soil was deep and that the roots from the native trees went far into the earth. Under all these circumstances, the plaintiff was justified in the belief that the land was adaptable for horticultural purposes, especially when

they saw flourishing orchards on all sides of the property. The statements respecting the fertility of the soil were, therefore, not made recklessly or without well-grounded belief in their truth. It is not shown that the plaintiff knew the statement made in support of the property to be false and clearly it was not reckless in publishing the circular upon which alone the defendants rely for proof of fraudulent statements. Clearly the defendants have failed to prove the scienter or its equivalent of reckless statement which is an essential element of actionable fraud. A litigant *sui juris* must take reasonable care of his own concerns. Equity will not treat him as a nursling, otherwise there would be no stability in any contract.

4. While it is not controlling as a rule of law, yet much force is to be given to the principle laid down by the United States District Court of Appeals when the case of *Vanderbilt* v. *Bishop*, 188 Fed. 971, was before that court, the opinion of which is reported in 199 Fed. 420 (117 C. C. A. 652), to the effect that the findings of a trial judge, based on evidence of witnesses before him, resulting in a substantial conflict with respect to material issues, will not be set aside on appeal. In the present instance the trial judge visited and inspected the premises; he had before him the witnesses in person, with but few exceptions where the testimony was taken before the reporter as referee; and hence was in a very much better situation than we are rightly to decide the questions here involved. A careful perusal of the record compels us to respect his decision. Accordingly the decree of the Circuit Court is affirmed.

Affirmed.

McBride, C. J., and Benson and Harris, JJ., concur.

Argued April 10, writ dismissed April 29, 1919.

HERBRING *v.* BROWN.

(180 Pac. 328.)

Statutes—Referendum—Constitutional Provision—Applicability—Joint Resolution.

1. Neither House Joint Resolution No. 1, ratifying proposed "National Prohibition Amendment," nor any other resolution of the legislature, is subject to referendum by Article IV, Sections 1, 1a, of the Constitution; such sections applying only to proposed laws.

Statutes—Initiative and Referendum—"Bill"—"Act"—"Joint Resolution."

2. To ascertain what is meant by the terms "bill" and "act" in Article IV, Sections 1, 1a, of the Constitution (amended), as to initiative and referendum, reference must be made to the sense in which the words were used before such amendments were passed, and, when reference is so made, it is found that the first term means a proposed law (Article IV, Section 1 [original], and Sections 18, 19; Article V, Section 15), while the second means a bill which has been enacted by the legislature into a law (Article IV, Sections 20, 21, 22, 28); a "joint resolution" being neither a bill nor an act.

Statutes—Initiative and Referendum—Constitutional Provision—Construction.

3. The subject matter upon which the powers given by Article IV, Sections 1, 1a, of the Constitution, may be exercised, namely, initiative laws, constitutional amendments, and acts of the legislature referred to the people, are referred to collectively as "measures" merely as a matter of convenience and not with intent to include other and different powers.

Mandamus—Ministerial Duties.

4. Since Article IV, Sections 1, 1a, of the Constitution, do not permit a referendum upon a House Joint Resolution, the attorney general cannot be compelled under Section 3475, L. O. L., as amended by Laws of 1917, page 230, to provide a ballot title for petitions demanding a referendum of such resolution on the theory that such act is ministerial.

Original proceeding in *mandamus* by Karl Herbring against George M. Brown, Attorney General of the State of Oregon. Demurrer to the petition was sustained and writ dismissed. WRIT DISMISSED.

For petitioner there was a brief over the names of *Mr. Theodore A. Bell* and *Messrs. Malarkey, Seabrook*

& Dibble, with oral arguments by *Mr. Bell, Mr. Dan J. Malarkey* and *Mr. E. B. Seabrook.*

For defendant there was a brief and an oral argument by *Mr. George M. Brown,* Attorney General of the State of Oregon, *in pro. per.*

For the Anti-Saloon League of Oregon and for the Anti-Saloon League of America, there was a brief submitted *amicus curiae,* over the names of *Mr. Elisha A. Baker,* of Portland, and *Mr. Wayne B. Wheeler,* of Washington, D. C.

In Banc.

McBRIDE, C. J.—This is a proceeding in *mandamus* arising from the following facts: During the 30th Legislative Assembly of the State of Oregon, which adjourned on February 27, 1919, there was enacted House Joint Resolution No. 1, which is a ratification of a proposed amendment of the Constitution of the United States, popularly known as the "National Prohibition Amendment."

On March 18, 1919, petitioner filed with the Secretary of State of Oregon a proposed form of petition demanding a referendum of said resolution, which petition is in form and substance as required by law.

On March 19, 1919, the Secretary of State sent to the attorney general, two copies of said petition and requested him to provide a ballot title therefor.

On March 25, 1919, after considering the matter in the meantime, the attorney general refused to provide a ballot title on the ground that in his opinion the measure was one which could not be referred to the people for two reasons: First, that a reference thereof to the people would violate Article V of the

Federal Constitution, wherein that article provides that the subject matter thereof should be passed on by the "legislature," which, as there used, is synonymous with "legislative assembly," and excludes the referendum. Second, that such reference to the people would violate Section 1 of Article IV of the Oregon Constitution, wherein it is provided that the people of Oregon "also reserve power at their own option to approve or reject at the polls any *act* of the legislative assembly," because, it is claimed, the Resolution, sought to be referred, is not an *act* within the meaning of the above-quoted phrase.

Much of the argument here is devoted to a discussion of the constitutionality of the proposed reference.

1. We do not believe this resolution, ratifying the proposed constitutional amendment, or any other resolution of our legislature, was made the subject of referendum by Sections 1 and 1a of Article IV of our amended Constitution, which are as follows:

"Section 1. The legislative authority of the State shall be vested in a Legislative Assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the Legislative Assembly, and also reserve power at their own option to approve or reject at the polls any act of the Legislative Assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less that four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the

public peace, health, or safety) either by the petition signed by five per cent of the legal voters, or by the Legislative Assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislative Assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the State shall be had at the biennial regular general elections, except when the Legislative Assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: 'Be it enacted by the people of the State of Oregon.' This section shall not be construed to deprive any member of the Legislative Assembly of the right to introduce any measure. The whole number of votes cast for Justice of the Supreme Court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor.

"Section 1a. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local,

special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent of the legal voters may be required to order the referendum nor more than fifteen per cent to propose any measure, by the initiative, in any city or town."

It seems clear to us that these sections apply only to proposed laws, and not to legislative resolutions, memorials and the like. In the initiative clause it is said:

"The people reserve to themselves power to propose *laws* and *amendments to the Constitution*, and to enact or reject the same at the polls."

The reservation clause reads:

"And also reserve power at their own option to approve or reject at the polls any *act* of the legislative assembly."

In the provision for referendum we find a direction that,

"Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which *passed the bill* on which the referendum was demanded."

In Section 1a we find the provision, that—

"The referendum may be demanded by the people against one or more items, sections, or parts of any *act* of the legislative assembly, in the same manner in which such power may be exercised against a *complete act*."

2. To ascertain what is meant by the terms "bill" and "act," as used in the amendments quoted above, we

must refer to the sense in which they were used in the Constitution before the initiative and referendum amendments were passed. The word "bill" occurs in Sections 2 of Article IV of the original Constitution, where it is said, "The style of every bill shall be 'Be it enacted by the legislative assembly of the State of Oregon,' and no laws shall be enacted except by bill," thus indicating that a bill is a proposed law; a document in the form of a law presented to the legislature for enactment.

The same word is used in Sections 18 and 19 of Article IV, and Section 15 of Article V, and in the same sense as above indicated.

We come now to the term "act," as used in the Constitution. In Section 20 of Article IV we find the following:

"Every *act* shall contain but one subject and matters properly connected therewith, which subject shall be embraced in the title. But if any subject shall be embraced in an *act* which shall not be embraced in the title, such *act* shall be void, only as to so much thereof as shall not be expressed in the title."

In Section 21, Article IV, the following occurs:

"Every *act* and joint resolution shall be plainly worded," etc.

In Section 22 of the same Article, it is ordained:

"No *act* shall ever be revised or amended by mere reference to its title," etc.

And in Section 28 it is prescribed:

"No *act* shall take effect until ninety days from the end of the session," etc.

No one can read these excerpts without at once arriving at the conclusion that, as referred to in the

Constitution, the term "bill" imports a document in the form of a law, presented to the legislature for enactment, and that the term "act," as there used, means a bill which has been enacted by the legislature into a law. That the framers of the Constitution intended to preserve the well-known distinction between "acts" and "joint resolutions," is indicated in Section 21, *supra*, wherein it is required that *acts* and *joint resolutions* shall be plainly worded.

The initiative and referendum amendments were passed and should be construed in the light of the construction put upon the terms "bill" and "act," by the instrument they proposed to amend, and taking this view it must be held that as a joint resolution is neither a bill nor an act, it is not subject to the referendum.

3. Counsel for petitioner suggest that the term "measures" used in the amendment, enlarges the scope of the powers reserved beyond the express reservation, but this is evidently not the purpose with which that term is employed. As before observed, there are two powers reserved: (1) The power to propose laws and amendments to the Constitution, and to enact or reject them at the polls, and (2) the power to enact or reject at the polls any act of the legislative assembly. The subject matter upon which these powers may be exercised, namely: Initiative laws, constitutional amendments, and acts of the legislature referred to the people, are thereafter referred to collectively as "measures," merely as a matter of convenience and to avoid frequent enumeration of the powers reserved, and not with the intent to include other and different powers within the scope of the amendment. Had it been the intent of the framers of the referendum

amendment to go beyond these express reservations, it would have been easy and natural for them to have said so.

To give the amendment the effect contended for by petitioners, we would have to read into the reservation the words "And resolutions," making it read, "The people reserve to themselves power * * to approve or reject at the polls any act (or joint resolution) of the legislative assembly," and where the amendment requires that the referendum petition shall be filed within ninety days "after the final adjournment of the legislature which passed the bill," we would be required to judicially amend the section so as to make it read, "within ninety days after the final adjournment of the legislature which passed the bill (or joint resolution)."

We are not prepared to go into the business of amending the Constitution to meet supposed hardships, and must hold that the referendum cannot be invoked in the present instance.

Under an amendment to the Constitution of California, in some particulars copied from that here discussed, and in all necessary particulars the same in substance, the Supreme Court of that state has held that the referendum can only be invoked against statutes and not against joint resolutions: *Hopping* v. *Council of City of Richmond,* 170 Cal. 605 (150 Pac. 977).

4. It is further urged that, even conceding that the resolution is not one which our amended Constitution permits to be placed upon the ballot, the attorney general is not the person or official who is entitled to raise the question; that his duties being purely ministerial, he is required to place a ballot title upon any petition

filed with the Secretary of State and transmitted to him, as required by Section 3475, L. O. L., as amended by Chapter 176, Laws of 1917.

It may well be contended that if a matter proposed for reference to the electorate is within that class of subjects, upon which the Constitution permits a referendum, to wit, acts passed by the legislature, the attorney general has no authority to pass upon the constitutionality of the procedure. This would certainly be a plausible contention in the case of petitions under the initiative provisions of the section now being considered. He probably could not be heard to say, "The law you propose to initiate would be unconstitutional if passed, therefore I will not give you a ballot title," but such a case is not before us. We have here presented a case where it is proposed to put upon the ballot for reference a proceeding by the legislature for which the Constitution has made no provision, and which does not belong to a class of subjects that can be referred under any circumstances. To hold that the attorney general must prepare a ballot title under such circumstances, would place him at the beck and call of any restless person who might desire to refer any subject, for the purpose of obtaining a straw vote upon it, from a joint memorial petitioning Congress to improve a harbor up to the action of the Peace Conference upon the covenant of the League of Nations.

The act, of which the section referred to is a part, does not contemplate any such contingency, and the opening paragraph of the first section is itself a legislative interpretation of the scope of the constitutional amendment, and reads as follows:

"The following shall be substantially the form of petition for the referendum to the people, on any *act* passed by the Legislative Assembly of the State of Oregon, or by a City Council": Section 3470, L. O. L.

It is a petition to refer an *act* that must be filed with the Secretary of State, and it is to a petition for an *act* that the attorney general is required to affix a ballot title.

The form of petition given in the section last referred to, is even more explicit. The descriptive portion of the form prescribed for a petition to refer, is as follows:

"We, the undersigned citizens and legal voters of the State of Oregon (and the district of ——, County of ——, or city of ——, as the case may be) respectfully order that the Senate (or House) bill No. ——, entitled (title of act and if the petition is against less than the whole act, then set forth here the part or parts on which the referendum is sought) passed by the Legislative Assembly of the State of Oregon at the regular (special) session of the Legislative Assembly, shall be referred to the people of the state," etc.

The section of the statute requiring the attorney general to affix a ballot title to petitions for a referendum, has reference to petitions regarding acts, that is: *Laws* passed by the legislature; as to these he is compelled to prepare ballot titles, but there is no statute requiring him to prepare such titles for any other.

This view renders it unnecessary to consider the other questions raised in the argument.

The demurrer will be sustained and the writ dismissed. WRIT DISMISSED.

Argued April 1, affirmed April 29, 1919.

NORTHWEST DOOR CO. *v.* LEWIS INV. CO.*

(180 Pac. 495.)

Appeal and Error—Review—Formal Assignment.

1. Assignment that court erred in rendering judgment for plaintiff is merely formal, and need not be considered.

Insurance—Fire Insurance—Rights Against Third Party—Subrogation.

2. Where company pays loss upon property destroyed by fire through negligence of a third person, the company becomes subrogated to the rights of insured to the extent of money paid under the policy.

Parties—Fire Insurance—Action Against Negligent Third Person.

3. Where insurance does not equal loss alleged from destruction of property by fire through the negligence of a third person, it is the duty of the company and insured to join as parties in action against the third person.

Damages—Fire—Defense—Payment of Loss by Insurance Company.

4. In action for negligent destruction of property by fire, defendant would not have the right to benefit of the insurance, and cannot rely, either in whole or in part, on defense that owner has been paid insurance by the company.

Insurance—Fire Insurance—Payment of Loss.

5. Evidence *held* sufficient to take to the jury the question whether insurance company paid any losses, so that they were entitled to be subrogated to insured's rights against defendant, a third person through whose negligence the property was destroyed by fire.

Negligence—Fires—Requirements of Ordinances.

6. Where fire which burned plaintiff's property was kindled on defendant's premises without the permit required by ordinance, an instruction that there was no evidence showing a violation of any ordinance, was properly refused.

Negligence—Fires—Violation of Ordinance—Negligence Per Se.

7. Where fire which was communicated to and destroyed plaintiff's property was kindled on defendant's premises without the permit required by ordinance, an instruction that where an act is done in violation of an ordinance, the law regards the act as negligently done was proper.

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*On right of insurer who has paid a loss to maintain action against the party causing the loss, see note in 2 **L. R. A. (N. S.)** 922.

On right of insured who has paid the loss as against insured who has recovered against or settled with third person responsible for the loss, see note in 41 **L. R. A. (N. S.)** 719.

On the question of use of photographs in evidence, see notes in 35 **L. R. A.** 802 and 51 **L. R. A. (N. S.)** 842. REPORTER.

Trial—Instruction—Judicial Intimation.

8. In action against defendant through whose negligence plaintiff insured's property was alleged to have been destroyed by fire started on defendant's premises, the words "having in view the probable danger of injury," at the end of each paragraph of an instruction defining negligence, *held* not a judicial intimation that there were dangers connected with the methods used by defendant in cleaning away debris from its property.

Appeal and Error—Objections in Lower Court—Instructions.

9. Where it was objected that court's instruction included items of damage not sustained by evidence, objection is insufficient to obtain review, where it failed to specifically point out what the items were.

Trial—Instructions Sufficiently Given—Refusal.

10. There was no error in refusing a requested instruction substantially covered by general instructions given.

Evidence—Photographs—Admissibility.

11. There being evidence tending to show that the condition of the premises photographed were substantially the same as on the day of the fire in question, there was no error in admitting the photographs.

Evidence—Competency of Expert—Market Value.

12. Preliminary testimony of a witness, tending to show that she had considerable knowledge of the market prices of the machinery, *held* to render her competent to testify as an expert as to the value of machinery destroyed by fire.

Appeal and Error—Evidence—Qualification of Witness—Discretion of Trial Court.

13. The determination of the qualification of a witness to testify as an expert is within the sound discretion of the trial court, and will not be disturbed on appeal, unless there is no evidence to sustain the decision.

Negligence—Fires—Evidence—Admissibility.

14. Where defendant's participation in burning debris from a former fire on its premises, resulting in the destruction of plaintiff's property, was in issue, evidence that defendant made claim against insurance companies for estimated cost of removing debris was admissible; it appearing that defendant's property was occupied by others at the time it was burned.

Negligence—Fires—Evidence—Admissibility.

15. Evidence as to finding fire on defendant's premises two days after plaintiff's property was destroyed by fire communicated from defendant's premises is properly admitted.

Trial—Instruction Covered by Charge—Refusal.

16. Requested instruction with reference to defendant being required to use only ordinary care and diligence to prevent fire started on its premises by third person from spreading to other premises *held* sufficiently covered by a general charge.

Trial—Erroneous Instruction—Cured by Other Instruction.

17. Error in using the expression "approximate cause" in instruction that if kindling of fire by defendant on its premises was the approximate cause of communicating sparks of fire resulting in the destruction of insured's property to find for plaintiff was cured by general instruction, stating, among other things, that "proximate cause" is the principal cause and is an important matter in cases of this kind.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

This is an action for damages arising out of the alleged burning of the mill and factory of the plaintiff, Northwest Door Company, by reason of the negligence of defendant, Lewis Investment Company. The salient facts in the case, concerning which there is practically no dispute, are as follows:

On and prior to the third day of June, 1914, the day of the fire in question in this case, the plaintiff, Northwest Door Company, was the owner of a planing-mill then in operation, and situated upon a tract of land containing about two and one-fifth acres of land, all located in Portland, Multnomah County, Oregon. This property is bounded on the north by a ferry slip near the foot of Albina Avenue, on the east by River Street, on the south by Irving Dock, and on the west by the harbor line in the Willamette River.

The planing-mill mentioned consisted of a large heavily constructed two-story frame mill building and additions, platforms, wharfs and docks covering the entire tract of land above described. In and about the planing-mill was a large quantity of fixed and movable machinery, together with equipment and implements; also a large quantity of planing-mill stock, manufactured and unmanufactured, and in process of manufacture, together with material for manufacturing the same; also a quantity of office furniture, fixtures and supplies. A large quantity of lumber and material

was stacked and stored upon said property of the plaintiff, Northwest Door Company, and in the structures thereon. The latter, at said time, also owned and was in possession of a large quantity of lumber located near its said property on land belonging to the Montgomery Estate, situated on the east side of River Street immediately east of its said property. The property described was of the value of about $150,000.

The defendant, Lewis Investment Company, was, at all the times mentioned, the owner and in possession and in control of the following described premises, to wit: River lots 16, 17, 18 and 19 in Albina, now in the City of Portland, Multnomah County, Oregon. The southern boundary of the last-described property runs parallel with the northern boundary of the said property of the plaintiff, Northwest Door Company, and said lines are divided and separated by what is known as the "Albina Ferry Slip," which is 60 feet in width.

Prior to March 12, 1914, defendant Lewis Investment Company, owned, maintained, operated and controlled a large warehouse and dock on its said premises above described, and extending to the harbor line in front of the same, which warehouse and dock were about 400 feet in length and more than 100 feet in width, and the south end thereof was distant about 60 feet in a northerly direction from the mill building and property of the plaintiff, Northwest Door Company. Said warehouse and dock were constructed of lumber and timbers, and the floors and platforms, except the portion thereof about 60 feet wide abutting on River Street, were supported and built on piles and timbers driven into the earth; the floor and joists upon that portion near River Street as aforesaid were placed upon large sills that rested upon the earth; a bulkhead, or firewall, constituted the south wall of the

warehouse and was constructed of two thicknesses of heavy timbers.

On the last-mentioned date a fire occurred, which burned defendant's said dock and warehouse and a large part of the contents thereof, and left upon said premises a great quantity of burning débris, consisting of grain and mixed therewith timber, sticks, burlap, and other inflammable material.

The plaintiff, Northwest Door Company, brings this action, joining with it the other plaintiffs, insurance companies who claim to have paid certain losses incurred by reason of the fire, and who claim the right of subrogation as to such payments. Other insurance companies, who are alleged to have paid like claims but who declined to join as plaintiffs, were made defendants along with the Lewis Investment Company.

The complaint charges the Lewis Investment Company with negligence in the following particulars:

"First. That in March 1914, a fire had destroyed the dock and its contents situated upon the dock property of said defendant lying to the north of and separated from the planing-mill property of plaintiff, Northwest Door Company, by the Albina Ferry slip, which is about sixty feet in width, and that the said defendant, on or about the 12th day of May, 1914, in order to consume and destroy débris and waste upon said dock premises remaining after said fire, carelessly and negligently lighted and kindled a number of fires in and upon its dock property with the charred and scorched timbers, merchandise and other inflammable matter thereon, and in the scorched and charred wheat remaining thereon.

"Second. That said defendant carelessly and negligently kept said fires burning up to and including June 3, 1914, and to the time of the fire that it is alleged destroyed the property of the plaintiff, Northwest Door Company, and negligently and carelessly replenished and increased and augumented said fires

during all of said times, and particularly on said third day of June, 1914.

"Third. That said defendant, in total disregard of plaintiff's rights and the danger to the property of plaintiff, Northwest Door Company, carelessly and negligently, during the times it is alleged said fires were burning, and particularly on the 3d day of June, 1914, refused to take any steps to guard and control said fires, and failed and neglected to guard the same, or any of them, or to take any precaution to prevent the same from spreading to or communicating with property in the vicinity, or to or with the adjacent mill or property of the plaintiff, Northwest Door Company, and carelessly and negligently failed to keep men on said premises to prevent the escape and spread of said fires to surrounding property, and to the mill and property of the plaintiff, Northwest Door Company.

"Fourth. That said defendant negligently and carelessly caused and permitted said fires to spread and communicate to the timbers of and to burn in the bulkhead located at the south end of defendant's said dock property.

"Fifth. That on the third day of June, 1914, while said fires were burning in said débris and in said bulkhead, and while a strong wind was blowing from the northwest, the said defendant carelessly and negligently failed to extinguish said fires, and negligently and carelessly kept the same burning, and negligently and carelessly failed to prevent the communication and spread thereof to the said planing-mill property of the plaintiff, Northwest Door Company.

"Sixth. That the said defendant, by its agents, servants, and employees, lighted and kindled said fires upon the —— day of May, 1914, and replenished the same and kept the same burning up until the destruction of the planing-mill property of plaintiff, Northwest Door Company, upon June 3, 1914, without first, or at all, having obtained a written permit so to do, signed by the Chief Engineer of the Fire Department of the City of Portland, Oregon, in violation of Ordinance No. 24014 of the said City of Portland,

regulating the lighting of fires in the open air of said city."

Plaintiffs further alleged in their complaint that by reason of the said defendant's alleged aforesaid carelessness and negligence, and by reason of the alleged violation by it of the above-mentioned ordinance of the City of Portland, Oregon, large quantities of sparks, burning cinders and live coals were blown and cast and scattered by the winds from said fires on the premises of the defendant, to and upon the mill building and property of the Northwest Door Company, and upon the shed or waiting-room adjacent to said plaintiff's said mill located upon the Albina Ferry Slip, and that thereupon said sparks, burning cinders and live coals kindled and lighted and set said shed and waiting-room and the mill and the property of the plaintiff on fire, and that the fire in said shed or waiting-room was communicated to the said mill and property of the plaintiff, Northwest Door Company, completely destroying the same and all of the property of the plaintiff described in and referred to in the amended complaint, to the damage of plaintiff, Northwest Door Company, and its real and personal property described in the amended complaint, in the full sum of $150,000.

The carelessness and negligence charged against the said defendant by plaintiffs, as well as the alleged violation of the city ordinance by said defendant, were denied by defendant Lewis Investment Company, in its answer.

The case was tried before a jury, which resulted in a verdict and judgment against defendant for seventy thousand ($70,000) dollars damages, from which judgment it appeals, assigning the following alleged errors:

First: That the court erred in rendering judgment in favor of plaintiff.

Second: That the court erred in instructing the jury as follows:

"It is alleged by plaintiffs that the plaintiff and defendant Insurance companies had, prior to the fire in question, issued their several policies of insurance to the plaintiff Northwest Door Company, and that after said fire the insurance companies respectively paid to plaintiff Northwest Door Company the full amount of insurance issued by them upon said property.

"I instruct you that where an Insurance Company pays a loss under a policy issued by it upon property damaged or destroyed by fire, where such fire occurs through the negligence of a third person, such Insurance Company becomes subrogated to the rights of the insured to the extent of the money paid by it under such policy, and in an action at law for the recovery of damages to such property from such third persons where the insurance does not equal the loss alleged to have been sustained, it is the duty of the Insurance Company and the owner to join as parties in such action. The defendant against whom such action is brought has no right to the benefits of the insurance and cannot rely either in whole or in part, on the defense that the owner of the property has been previously paid by the Insurance Company. Payment to the owner by an Insurance Company of the amount of his loss, in whole or in part, does not bar the right of action against one originally liable for the loss. In this case the defendant, Lewis Investment Company, has no concern with any contract that the plaintiff, Northwest Door Company, may have had with the Insurance companies, and said defendant's right or liabilities can neither be increased nor diminished by the fact that such contracts exist. Therefore, I instruct you that in determining the damages, if you reach that stage of the case, you should proceed as though the Insurance Companies, plaintiff and defendant, were not parties to the cause, and as though the

action was prosecuted by the plaintiff, Northwest Door Company, alone against the defendant, Lewis Investment Company, alone, and if you should award damages it will be your duty to find generally for the plaintiffs, as their several interests are regarded as a single claim. Of course you understand while that is true, the Insurance companies are parties plaintiff and defendant just the same."

Third: That the court erred in refusing defendant's request for the following instruction:

"I instruct you that so far as the Insurance companies plaintiffs are concerned in this case, that there is no right shown for the said Insurance companies to recover for any negligence on the part of the Lewis Investment Company allowing said Insurance Companies to recover, and therefore I instruct you that you are not to find a verdict in favor of the said Insurance companies plaintiff, or any of them jointly or severally as against the Lewis Investment Company."

Fourth: That the court erred in instructing the jury as follows:

"If you find from a preponderance of the evidence that the Lewis Investment Company kindled and lighted fires on its said dock premises for the purpose of burning débris and waste, as alleged in plaintiffs' amended complaint, without first having obtained a written permit so to do signed by the Chief Engineer of the Fire Department of the City of Portland, as required by the ordinance of said city, and that sparks, burning cinders or coals were carried by the wind from said fire or fires, to the property of the Northwest Door Company, thereby igniting and setting the same on fire, and you further find that the kindling and lighting of said fires was the approximate cause of the communication of said sparks, burning cinders or coals to said planing-mill property, and the destruction thereof by fire, you should find for plaintiffs.

"In this connection, I instruct you that where an act is done in violation of a city ordinance,

which act is the proximate cause of injury to the property of another, the owner of that property is not required to prove that such act was negligently done, but the law regards such act as negligence in itself.

"If you find that the violation of the ordinance did not cause the fire in this case, then it could have nothing to do with the matter, and should not be considered by you.

"In other words, if the fire would have taken place anyhow, whether there was a written permit or not, it wouldn't make any difference whether they had the permit or not."

Fifth: That the court erred in failing to give the following instruction requested by defendant:

"I instruct you that there is no evidence in this case showing a violation of any ordinance which was the proximate cause, or had anything to do with the setting of the fire at the plant of the Northwest Door Company, and therefore instruct you to disregard any evidence as to the violation of the ordinance."

Sixth: The court erred in giving the following instruction:

"In this connection I instruct you that where an act is done in violation of a city ordinance, which act is the proximate cause of injury to the property of another, the owner of that property is not required to prove that such act was negligently done, but the law regards such act as negligence in itself."

Seventh: That the court erred in admitting in evidence Ordinance 24,014 of the City of Portland, Oregon, which reads as follows:

"Section 1. It shall be unlawful for any person to light or kindle a bonfire or any fire for the purpose of consuming waste material in the open air, within the limits of the City of Portland, regardless of whether the same be lighted on a public street or other public ground, or on private property, without first having obtained a written permit so to do, signed by the Chief

Engineer of the Fire Department, who shall in all cases, when requested so to do, grant permits therefor, excepting when in his judgment, the kindling of such fires would endanger the safety of life or property.

"Section 2. Any person violating any of the provisions of this ordinance shall, upon conviction thereof in the Municipal Court, be punished by a fine not exceeding five hundred ($500) Dollars, or by imprisonment in the City Jail for not more than ninety (90) days, or by both such fine and imprisonment."

7½. The court erred in refusing to give the following instruction requested by defendants:

"Negligence may be defined as the failure to do that which a reasonably prudent person, guided by those considerations which ordinarily regulate the conduct of human affairs, would have done under the circumstances, or the doing of something which, under the circumstances, a reasonably prudent person would not have done."

Eighth: The court erred in giving the following instruction:

"Negligence is the counter term of diligence. It is the want of that reasonable care which would be exercised by a person of ordinary prudence under the existing circumstances, having in mind the probable danger of injury.

"This is the standard by which you are to determine in this case whether there was any negligence upon the part of the Lewis Investment Company. You will observe that this description of negligence, which I have given you, does not call for the highest degree of care, nor yet is it satisfied with a low degree of care. The law has taken as its standard the man of ordinary prudence and when the law undertakes through the tribunal which is called upon to determine the fact whether one has been negligent or not, the question is: was the conduct of the one charged the reasonable conduct of a person of ordinary prudence, under the

existing circumstances, having in view the probable danger of injury."

Ninth: The court erred in giving the following instruction:

"I instruct you that in the event you find for the plaintiffs it will be your duty to award plaintiffs such sum not exceeding One Hundred Fifty Thousand Dollars as you may find the plaintiff, Northwest Door Company, damaged by reason of said fire by the destruction of its two story frame building and additions, including trams, platforms, wharfs, log slides, piling, capping and bulkheads; and also fixed and movable machinery, parts, attachments and connections, settings and foundations of same, including shafting, gearing, pulleys, bearings, belting, planers, engines, pumps, piping, tools, millwright works, saws, conveyers, rollers, skids, cranes, chains, cars, wagons, tracks, wheelbarrows, jacks, electric light and power system, blow-pipe system, fire protection system, tools, implements, supplies and apparatus and patterns contained in and about said above described mill building and additions thereto; also planing mill stock manufactured and unmanufactured, and in process of manufacture, and lumber and material for manufacturing the same, and office furniture, equipment, fixtures, supplies, books, records and papers."

Tenth: That the court erred in refusing to give the following instruction:

"I instruct you in this case that it is necessary for the plaintiffs before they can recover, to prove three things: First, that the fire occurred; second, that the fire in the door factory was caused by the fire from the ruins of the Lewis Investment Company or the Columbia Dock; and third, that the Lewis Investment Company, or its workmen, were guilty of negligence at the time, causing the fire to be communicated from the Columbia Dock to the door factory. It is not sufficient for the plaintiffs to prove one or two of these elements, but all three of the elements must be proved to your satisfaction by a preponderance of the evi-

dence, and if the plaintiffs fail to prove by a preponderance of the evidence all three of these items, then I instruct you that the plaintiffs cannot recover."

Eleventh: That the court erred in admitting photographs offered by plaintiff, Northwest Door Company.

Twelfth: That the court erred in admitting the testimony of Clara B. Thomas as an expert witness on values.

Thirteenth: That the court erred in admitting the testimony of L. A. Lewis, showing the estimated cost of removing débris from Columbia Dock.

Fourteenth: That the court erred in admitting testimony of C. W. Robison, in relation to finding fire in the bulkhead on the south side of Columbia Dock two days subsequent to the fire.

Fifteenth: That the court erred in failing to give the following instruction requested by defendants:

"I instruct you that where a fire is in progress upon a person's premises, which fire, however, was not started by the person owning the premises, the measure of duty on the person owning the premises is to use only ordinary care and diligence to prevent that fire from spreading to other premises."

Sixteenth: That the court erred in failing to give the following instruction requested by defendants:

"Therefore, in this case, if you should find that the fire on the premises of the Lewis Investment Company was not started by the Lewis Investment Company, or its agents, but from some other source, and you should further believe that the said defendants did use ordinary care and diligence, then the defendants in this case would not be liable." AFFIRMED.

For appellant there was a brief over the names of *Messrs. Wilbur, Spencer & Beckett* and *Messrs. Teal, Minor & Winfree*, with oral arguments by *Mr. Ralph R. Wilbur* and *Mr. Joseph N. Teal.*

For respondents there was a brief over the names of *Messrs. Sheppard & Brook, Messrs. Veazie, McCourt & Veazie,* and *Messrs. Goodfellow, Eells, Moore & Orrick,* with oral arguments by *Mr. Chester A. Sheppard* and *Mr. John McCourt.*

McBRIDE, C. J.—The testimony in this case covers more than one thousand pages and is conflicting in many particulars and a general review of it is impracticable. It is sufficient to say generally that there was sufficient testimony to justify the jury in finding that the destruction of plaintiff's mill was caused by the negligence of the defendant, Lewis Investment Company, in lighting and maintaining its fires upon the Columbia Dock property, even though this court, sitting as triers of the fact, might arrive at a different conclusion. Our task is to ascertain and determine from the record whether the trial was so conducted and the jury so instructed that no error to the prejudice of the substantial rights of the defendant may have influenced the verdict arrived at.

We will consider the alleged errors in the order in which they are assigned in the abstract, and as shown in the foregoing statement.

1. The first assignment is merely formal and need not be discussed.

2–4. As to the second assignment, we are of the opinion that the instruction correctly states the law: *Fireman's Ins. Co.* v. *Oregon R. R. Co.*, 45 Or. 53 (76 Pac. 1075, 2 Ann. Cas. 360, 67 L. R. A. 161, and cases there cited).

5. It is further contended that there is no legal evidence that the insurance companies paid any losses on account of the fire, and that plaintiffs have, therefore, failed to establish their right to subrogation. It is

true the testimony in this regard was oral and informal, but it was received without objection and was sufficient to take the matter to the jury. Samuel Connell, president of the Northwest Door Company, testified in substance, that he had examined the complaint and knew the list of companies therein specified; that the Northwest Door Company had insurance with all those companies, and that the losses were paid, as set forth in the complaint. In the absence of any objection, this epitomized the whole subject and was probably quite as enlightening to the jury as the presence of the policies, proofs of loss and receipts for payment thereof, would have been. There was no necessity for any formal assignments of *pro rata* proportions of the losses paid to the companies paying them. As shown by *Fireman's Ins. Co.* v. *Oregon R. R. Co.*, 45 Or. 53 (76 Pac. 1075, 2 Ann. Cas. 360, 67 L. R. A. 161), the right of an insurance company to subrogation follows as a matter of law from its payment of the loss. For the reasons above stated the request embraced in assignment IV was properly refused.

6, 7. Assignments V and VI relate to the instruction of the court, relating to the effect of the violation of the city ordinance, prohibiting the lighting or kindling of fires within the city limits without a permit from the chief engineer of the fire department. It is conceded the defendant had no such permit. It applied for a permit, which the chief engineer declined to grant but referred defendant to the mayor, who gave it some sort of verbal permission to burn the débris on the remains of Columbia Dock, but this permission was, legally, as ineffective as though it had been granted by the pastor of one of the city churches. It stands, therefore, practically admitted that any fire kindled or lighted by defendant, in the process of removing

the débris from its dock, was maintained in violation of the ordinance.

This being true and assuming that there was evidence to go to the jury, tending to show that the burning of plaintiff's mill was the result of fire communicated from the bonfires so unlawfully built and maintained, the question as to whether the building of such bonfires constituted negligence *per se* or were merely evidence of negligence becomes very important.

The decisions in this state are not harmonious. In *Beck* v. *Vancouver R. R. Co.*, 25 Or. 32 (34 Pac. 753), such violation was held to be only evidence of negligence. In *Kunz* v. *Oregon R. & N. Co.*, 51 Or. 191 (93 Pac. 141, 94 Pac. 504), Justice MOORE, without directly passing upon the question, intimates that such a violation is only evidence of negligence. In *Peterson* v. *Standard Oil Co.*, 55 Or. 511 (106 Pac. 337, Ann. Cas. 1912A, 625), the writer of the opinion suggested that such violation was evidence of negligence and not negligence *per se*, and attempted to distinguish between city ordinances and state statutes in that regard. The direct question was not involved in that case, which was brought under a state statute and only arose incidentally. The same doctrine was announced in *Palmer* v. *Portland, Ry. L. & P. Co.*, 56 Or. 262 (108 Pac. 211), and in *Stewart* v. *Portland Ry. L. & P. Co.*, 58 Or. 377 (114 Pac. 936), several of these being written by the author of this opinion, and representing then and now his personal view upon a question upon which the courts are at variance.

In *Morgan* v. *Bross*, 64 Or. 63 (129 Pac. 118), the question came up again, and in an opinion by the late Justice MOORE the doctrine announced in *Beck* v. *Vancouver R. R. Co.*, 25 Or. 32 (34 Pac. 753), and the cases

following that case, was overruled and the doctrine announced that, violation of an ordinance for the protection of the public, constituted negligence *per se.* This case was the subject of much discussion and some difference of opinion here, but it represented the deliberate judgment of a majority of the court, and must be taken as a final interpretation of the law in this jurisdiction. The same rule was adopted in *Rudolph* v. *Portland Ry. L. & P. Co.*, 72 Or. 560 (144 Pac. 93).

It being now the settled law in this state that violation of ordinances, of the character of the one under discussion, constitutes negligence *per se,* it now remains to apply the rule to the circumstances of this case.

It is fundamental that a person committing an unlawful act, which is the proximate cause of injury to another, will be compelled to respond in damages for such injury. The building of bonfires upon defendant's property was an unlawful act. It was not unlawful to fail or neglect to secure a permit, because so long as no fire was kindled the having or not having a permit was of no consequence. The unlawful act consisted in kindling a fire without the permit. The object of the ordinance was to prevent the building of bonfires in those cases or at those seasons or in those localities when, in the experienced judgment of the chief engineer of the fire department, such fires might result disastrously.

Whether with good or bad intent the fact remains that defendant, in the light of plaintiffs' evidence and in the judgment of the jury, unlawfully kindled a fire which burned plaintiff's property. Assuming, as we must after verdict, that the fires maintained by defendant produced the injury, we have this syllogism. The defendant unlawfully kindled a fire; it destroyed plain-

tiff's property; therefore, defendant must respond in damages. It is idle to speculate upon what would have happened if defendant had secured a permit. If defendant had acquiesced in what was practically a refusal by the chief engineer to issue the permit, and taken some other method of disposing of the waste and débris, which encumbered its property, then (assuming the verdict of the jury to be correct) no fire would have happened. The proximate cause of the injury in this case was the unlawful building of a fire so near the property of plaintiff that the fire got out of bounds and destroyed plaintiff's property.

The case of *Burbank* v. *Bethel Steam Mill Co.*, 75 Me. 373 (46 Am. Rep. 400), cited by counsel, is easily distinguished from the present. In that case the statute made the erection of a steam engine in any municipality a nuisance unless a license was obtained. The defendant erected such an engine and it was claimed the sparks therefrom set fire to and burned defendant's mill, and that the fire from the burning mill was communicated to plaintiff's house and destroyed it. In that case the thing prohibited was not the direct cause of the injury. The erection of the engine in itself did not destroy the plaintiff's property, but the use made of it after it had been unlawfully built was the injury complained of.

The distinction made by the court seems subtle and very technical and is not borne out by the cases cited in support of it. The court seems to have assumed that a license must necessarily have issued in case it had been applied for; in fact, the provision of the statute seems more designed to provide for inspection and inquiry into the method of its erection and the safeguards against public danger and convenience, than for any other purpose. Thus the statute provided for

a public notice of the hearing of the application and an investigation as to the height of chimneys, flues, size of boiler and furnace, and means of protection against fire and explosion: Me. Rev. Stats., p. 214, § 13 et seq.

This statute did not make the erection of such an engine a criminal offense, but provided that the authorities might cause it to be abated as a nuisance. The case seems to be an unique one and, in the writer's opinion, is not sustained by the better authorities, while some of the authorities cited in the opinion certainly lay down a different doctrine from that therein expressed.

It will be noticed the Maine case was not an action based upon violation of a municipal ordinance, but upon a violation of a state statute and, therefore, if authority in any way in this case it would be upon the proposition that when violation of a state statute is the proximate cause of any injury, such violation is not negligence *per se* but only evidence of negligence, a doctrine repudiated in *Peterson* v. *Standard Oil Co.*, 55 Or. 611 (106 Pac. 337, Ann. Cas. 1912A, 625), and by the great weight of authority in this country. The Maine case does not attempt to differentiate between the effect of state statutes and municipal ordinances in the respects mentioned, and Maine may be classed among the few states holding that the injurious violation of a state statute is only *prima facie* evidence of negligence.

Error is predicated upon the failure of the court to give the instruction set forth in assignment VII½, but this request is practically included in the instruction set forth in assignment VIII.

8. Assignment VIII challenges the correctness of the instruction therein set forth, by reason of the words "having in view the probable danger of injury," hav-

ing been added at the end of each paragraph. It is earnestly argued that the words quoted constituted judicial intimation to the jury that there were dangers connected with the methods used by the defendant in clearing away the débris from its dock and was, therefore, likely to have had a prejudicial effect against defendants. We think the assumption far-fetched. The proposition was stated generally and without reference to any fact in the particular case, and merely amounted to saying that one using fire, a known dangerous element, should consider the probable consequences of such use and the known dangers that result from the element getting beyond control, and use ordinary care to prevent such consequences. The phrase objected to is a mere variation of the language used in *Kendrick* v. *Towle,* 60 Mich. 363 (27 N. W. 567, 1 Am. St. Rep. 526), wherein the trial court defined negligence as follows:

"Negligence consists in the failure to use that degree of care which the law requires for the protection of interests *likely to be injuriously affected* by the want of it."

Concerning which definition the court observes:

"This definition was given by one of the ablest elementary law-writers of modern times, and has received the approval of this court: *Flint & P. M. Ry. Co.* v. *Stark,* 38 Mich. 717; *Brown* v. *Congress & B. St. Ry. Co.,* 49 Mich. 153 (13 N. W. 494), and we see no good reason for withdrawing that approval."

In *Martin et al.,* v. *Texas & Pac. Ry. Co.,* 87 Tex. 117 (26 S. W. 1052), the court approved the following instruction:

"By ordinary and proper care and diligence, is meant such care and diligence as a person of ordinary prudence and caution would commonly exercise under the circumstances, and the degree of care and diligence

required in each case is *proportionate to the amount of danger probably consequent* to a failure to exercise care and diligence."

In the case at bar, while we would not commend the phrase criticised as the best possible language that could have been used, we are satisfied that it never could have been taken by the jury as an expression of opinion as to the merits of any phase of the controversy, and it is sustained by good authority. Taking the charge upon this subject as a whole, it was entirely fair to the defendant.

9. Assignment IX predicates error upon the court enumerating certain items of damages, concerning which it is claimed that no testimony was given. It is apparent that the court in its charge read from the complaint the list of items of property, which it was claimed were destroyed by fire, and then instructed the jury that if it found for the plaintiff it should allow such sum as it should find the plaintiff was damaged by their destruction. In this enumeration there are some items of apparently minor importance, concerning which no testimony was given at the trial.

Defendant's counsel enumerates trains, log slides, bulkheads, gearing, conyerers, rollers, skids, cranes, chains, wheelbarrows and jacks, as the items concerning which no testimony was given, but as to several of these the objection amounts to a mere verbal distinction, the articles being called by one name in the complaint and by another, or other designations, in the testimony. But it is beyond question that there was no evidence showing the existence of any log slides or bulkheads in connection with the plant, and there may be one or two other small items in the same condition, although after a second reading of the testimony the writer is unable to recall any others.

But we do not think the exception was sufficient to save the point urged. The objection should have distinctly pointed out to the court the items concerning which no testimony had been offered so they could have been eliminated. In matters concerning the admission of evidence the law has certain general formulae, such as "irrelevant," "incompetent," or "immaterial," which are frequently but not always held to sufficiently state an objection, but this rule cannot well be applied to an exception to an instruction. An exception to an instruction should, in fairness to the court, be sufficiently definite to enable the judge to check up on the evidence and eliminate an objection of the character here made, by withdrawing from the consideration of the jury the item, concerning which no testimony was offered. To hold otherwise would make the right of objection on this ground a mere trap to ensnare the court into technical error.

This case furnishes an example. The trial was begun on May 15th, and concluded on June 6th, nearly three weeks later, the sessions being practically daily, except holidays. Over a hundred witnesses were examined. The items enumerated in the complaint were very numerous and perhaps amounting to fifty or more. To expect the court to preside at the trial, hear and rule upon an objection every ten minutes, consider arguments of counsel upon the law, prepare his charge to the jury, and still carry in his memory a tally of the items upon which testimony was offered, and be able to recall those concerning which no testimony was given, would be to require more than any judge on earth is capable of.

Under such circumstances, counsel have two remedies; one is to point out to the court those items of plaintiff's claim, concerning which no testimony has

been offered, and ask that they be withdrawn from the consideration of the jury, or, they may object to the instruction, pointing out such items specifically so the court may correct his instructions to conform to the testimony.

The rule, relating to an instruction of the character here complained of, is analogous to that announced in *Murray* v. *Murray*, 6 Or. 17; *Langford* v. *Jones*, 18 Or. 307 (22 Pac. 1064); *Nickum* v. *Gaston*, 24 Or. 380 (33 Pac. 671, 35 Pac. 31), in which it is held that where a general exception is taken to a series of propositions, it is insufficient if one of them is good. In those cases, as in this, the underlying principle is, that the judge is entitled to know specifically what the party is objecting to, with a view to enabling him to correct the mistake, if one exists.

10. Assignment X relates to the failure of the court to give the requested instruction set forth therein. This request was substantially covered in the general instruction given, and there was no injury to defendant by the refusal of the court to give it in the exact language desired by defendants.

11. Assignment XI relates to the admission of certain photographs taken two days after the fire had occurred. There was evidence tending to show that conditions on the premises photographed, were substantially the same as on the day of the fire, and there was no error committed in admitting the photographs.

12. Assignment XII predicates error in the admission of the testimony of Clara C. Thomas, as to values of the machinery destroyed in the fire, it being claimed she disclosed no qualifications to testify as an expert on values. This witness testified as to her qualifications as follows:

"Q. Where do you live Miss Thomas?
"A. Portland.
"Q. What is your occupation?
"A. I am with the American Wood Working Machinery Co.
"Q. How long have you been working for them?
"A. About six years.
"Q. What are your duties there?
"A. I do clerical work, stenographic work, and assistant to the manager.
"Q. Does your duties there bring you in contact with the prevailing prices of woodworking machinery?
"A. It does.
"Q. Was that true in 1914?
"A. Yes.
"Q. At that time were you acquainted with the price of various woodworking machinery?
"A. Yes, in the planing-mill and factory line.
"Q. Do you handle new machinery and second-hand machinery?
"A. Yes; we deal principally in new machinery, but we have some second-hand machines.
"Q. Where does that company sell its machines, in what states?
"A. We sell in practically every state in the Union, and foreign countries also."

Upon cross-examination, Miss Thomas gave the following testimony:

"Q. Your work there is entirely office work, is it not?
"A. Yes, and whatever selling comes into the office, I am more or less interested in. I have sold single machines, and also sold whole planing-mill outfits.
"Q. You are a stenographer in the office?
"A. Yes, and assistant to the manager.
"Q. You have charge of the stenographic work?
"A. Yes, I have charge of the office.
"Q. You do the bookkeeping?
"A. We have no books at all.

"Q. You have never been in the machinery or mill line yourself, in a practical capacity?

"A. No, sir."

13. The determination of the qualifications of a witness to testify as an expert, is within the sound discretion of the trial court, and will not be disturbed on appeal unless there is no evidence to sustain the decision: *Rugenstein* v. *Ottenheimer*, 70 Or. 600 (140 Pac. 747). We are of the opinion the preliminary testimony of the witness tended to show that she had some, in fact, considerable knowledge of the market prices of machinery, and under the holdings in this state this renders her testimony on that subject competent: *Willis* v. *Horticultural Fire Relief*, 77 Or. 621 (152 Pac. 259).

14. Assignment XIII relates to the admission of the testimony of L. A. Lewis. Paragraph IX of plaintiffs' complaint, charged the defendant, Lewis Investment Company, with having kindled and maintained fires for the purpose of removing and consuming the débris upon Columbia Dock, which allegation was denied in the answer. The issue thus made was broad enough, as will be seen by the pleadings, to require some proof that the defendant participated in removing the débris, especially as it appeared from the testimony that the defendant's dock was occupied by other parties at the time it was burned. The fact that defendant had made a claim against the insurance companies for the estimated cost of the removal of the débris, indicated an intention on its part to take charge of its removal. The testimony was not strong and somewhat remote but it was not inadmissible. The fact that it was used in argument for a purpose for which it was not admitted, did not destroy its rele-

vancy, and no exception seems to have been taken to the course of counsel for plaintiff in so misusing it.

15. For the reasons stated in respect to the admission of the photographs, we hold that the testimony of C. W. Robison, constituting assignment XIV, was properly admitted.

16. We think assignments XV and XVI sufficiently covered by the general charge.

In general instruction VI, negligence is defined as the want of that reasonable care which would be exercised by a person of ordinary prudence under the existing circumstances, having in mind the probable danger of injury. Instruction VII, heretofore quoted, elaborates this definition to the extent of making plain what constitutes ordinary care. Instruction XI places the burden of proof upon the plaintiff to establish negligence.

Then follows instruction XII which, in our opinion, fully and fairly covers all matters embraced in assignments XV and XVI, and which is as follows:

"I instruct you that after one discovers fire on his premises (not set by himself) he is bound to exercise ordinary care and diligence to prevent it from spreading so as to endanger his neighbor's property. He is bound to put forth such reasonable effort to prevent the fire injuring his neighbor's property as a man of ordinary prudence, who was actuated by a proper regard for his neighbor's rights and safety, would in like circumstances put forth; and I instruct you that if you find from a preponderance of the evidence that at and prior to the time of the fire, which the plaintiffs allege destroyed the planing-mill property of plaintiff, Northwest Door Company, a fire or fires were smoldering or burning upon or in defendant, Lewis Investment Company's property, and that said defendant knew, or should have known, that said fires were so smoldering or burning upon its property, and that said defendant

carelessly and negligently failed to extinguish the same, or carelessly and negligently failed to guard or control the said fire or fires, or carelessly and negligently failed to take reasonable precautions to prevent the escape and spread of said fire or fires to the mill and property of plaintiff Northwest Door Company, and you find that by reason of such carelessness and negligence in any of the respects mentioned in this instruction, the planing-mill property of plaintiff Northwest Door Company was set on fire and destroyed by fire communicated thereto from sparks, burning cinders, or live coals blown, cast or scattered by the winds from said fires smoldering or burning on said defendant's said premises to and upon said planing-mill property, your verdict should be for plaintiffs."

This instruction stated the law fully and plainly and, taken in connection with the other instructions referred to, was sufficient.

17. It is claimed in the brief, though not assigned as error in the abstract, that the court erred in giving the following instruction:

"If you find from a preponderance of the evidence that the Lewis Investment Company kindled and lighted fires on its said dock premises, for the purpose of burning débris and waste, as alleged in plaintiff's amended complaint, without first having obtained a written permit so to do, signed by the Chief Engineer of the Fire Department of the City of Portland, as required by the ordinance of said city, and that sparks, burning cinders or coals were carried by the wind from said fire or fires to the property of the Northwest Door Company, thereby igniting and setting the same on fire, and you further find that the kindling and lighting of said fires was the approximate cause of the communication of said sparks, burning cinders or coals to said planing-mill property, and the destruction thereof by fire, you should find for plaintiffs."

The alleged error here is the use of the words "approximate cause" instead of "proximate cause."

This was probably an inadvertence of the court or the stenographer, and while there is a technical distinction between the two words, it is wholly improbable that the misuse of the word "approximate" misled the jury or had any effect upon the verdict. In view of subsequent instructions, we think this mere verbal error is cured in any event.

In general instruction XVIII the court used the following language, certain phrases of which we italicise:

"The *proximate cause* is an important matter in cases of this kind. The *proximate cause* is the principal cause, it is the main cause, the cause without which the accident would not have happened; in other words, without which the fire would not have happened. Ask yourselves what caused this fire? What was the main cause? What was the principal cause of this fire? That is, the *proximate cause.*"

And in the succeeding instruction the court said:

"I have used the expression '*proximate cause*' and by proximate cause is meant that, which in natural and continuous sequences produces the event without which the injury would not have happened. Does the evidence in this case satisfy you that the negligence, if there was negligence upon the part of the Lewis Investment Company, was the *proximate cause* of the burning of the Northwest Door Company plant? That is to say, was it that which produced the event, and without which this factory would not have been burned? And if you find that the negligence of the defendant company was not the *proximate cause* of the burning of the Northwest Door Company factory, then and in that event your verdict should be for the defendant."

In view of the whole charge, we do not think the inadvertent use of the word "approximate" constitutes reversible error.

It may not be inappropriate here to correct a printer's blunder in regard to the same word. In

Peterson v. *Standard Oil Co.*, 55 Or. 511, at page 522 (106 Pac. 337), the type makes the writer of that opinion and of this use the term "approximate cause." An inspection of the original opinion on file here shows that he in fact wrote "proximate cause." The opinion is correctly printed in the Pacific Reporter.

Upon the whole, we are satisfied that the case was fairly tried in the court below, and while, as usual, in these long drawn out cases some merely technical mistakes and oversights may have occurred, there were none which affected the final result, or which constitute reversible error. The briefs of respective counsel might well serve as models of arrangement and have greatly facilitated the labors of the court in its investigations.

The judgment is affirmed. AFFIRMED.

BENSON, BURNETT and HARRIS, JJ., concur.

Argued March 14, reversed and remanded April 29, 1919.

BRIDGES *v.* MULTNOMAH COUNTY.*

(180 Pac. 505.)

Counties—Suit Against County—Condition Precedent—Presentation of Claim.

1. In view of Sections 3048–3050, 3052, L. O. L., providing that auditor shall be the accounting officer for the county, "that all claims against the county" "shall be presented to him," and that "he shall examine and audit" every claim, a claimant must allege and prove that he has presented claim arising out of contract to the auditor.

Judgment—Pleading to Support.

2. Complaint in suit against county on claim arising out of contract, where lacking in material and essential allegation that claim

*On the question of presentation of claims against a county before a county board as a condition precedent to suit, see note in 39 L. R. A. 77. REPORTER.

had been presented to county auditor as required by Sections 3048, 3049, 3052, L. O. L., will not support judgment for claimant.

Pleading—Cure by Verdict.

3. If complaint in suit against county on claim arising out of contract contained terms sufficiently general to comprehend the essential fact of presentation of the claim to the county auditor, the failure to expressly aver the fact of presentation is cured by the verdict.

Counties—Presentation of Claim to Auditor—Pleading.

4. Plaintiffs, by expressly alleging that they presented their claim based on contract to the board of county commissioners, impliedly say that they did not present it to the county auditor, and their complaint is insufficient to support judgment, though containing allegation that payment of claim was demanded and refused by the county.

Constitutional Law—Judicial Legislation—Justice of Law.

5. The courts must accept a statute as they find it, though such an acceptance leads to a harsh result.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

There was a verdict and judgment for the plaintiffs, J. B. Bridges and F. T. Webber, who are partners. The defendant, Multnomah County, appealed. The complaint avers that the defendant employed the plaintiffs, who are architects, to make plans and sketches for a hospital; that pursuant to the employment the plaintiffs made plans which were approved by the agents of the defendant and then submitted to the county for its approval, but "the board of county commissioners of Multnomah County deferred action on the matter and left the matter open for determination." The next three paragraphs found in the complaint are as follows:

"IV. That on January 21, 1914, the plaintiffs presented their bill for said services to the board of county commissioners of Multnomah County for the reasonable value of said services performed in the sum of one per cent of the estimated cost of said Multnomah County Hospital of $400,000, or $4,000. That said bill in said matter has been under consideration by the board of county commissioners, and on July 23,

1917, the board of county commissioners ordered on motion of Commissioner Holman, the bill of Bridges & Webber, architects, dated January 21, 1914, for services said to have been rendered for making preliminary plans for the proposed new Multnomah County Hospital, be and the same is hereby disallowed.

"V. That the reasonable value of said services so performed by plaintiffs for Multnomah County under said employment is the full sum of $4,000.

"VI. That payment of the same has been demanded, and payment of the same has been refused by Multnomah County on July 23, 1917, and no part thereof has been paid."

The answer admits the partnership of the plaintiffs, the existence of the defendant and also the last sentence in paragraph 4, and denies the remainder of the complaint. AFFIRMED.

For appellant there was a brief over the names of *Mr. Walter H. Evans*, District Attorney, and *Mr. George Mowry*, Deputy District Attorney, with an oral argument by *Mr. Mowry*.

For respondent there was a brief and an oral argument by *Mr. Ralph R. Duniway*.

HARRIS, J.—1. The county contends that the pleadings do not support the judgment, for the reason that there is no averment in the complaint or in the answer that the plaintiffs presented their claim to the county auditor. There is no bill of exceptions and consequently the only question for decision is whether the pleadings are sufficient to enable the judgment to stand. Section 3048, L. O. L., among other things, provides as follows:

"The county auditor shall be the accounting officer for the county. All demands, accounts, or claims

against the county shall be presented to him with the necessary evidence in support thereof, and he shall examine and audit the same, and if he finds such demands, accounts, or claims correct, lawful, just, and valid, indorse them as audited and approved, with the date thereof, and report them to the County Court or board of county commissioners on the first Thursday after the first Monday of each month, or as soon thereafter as possible, and at such other times as they require, together with such suggestions and explanations as he may deem proper; and if a demand, claim, or account and evidence in support thereof is not sufficient to satisfy him as to its correctness, lawfulness, justness, or validity, he shall indorse the same as audited and rejected, with date thereof, and report the same to the county court or board of county commissioners at the same time and place as those duly approved, with such explanation as he may deem necessary."

Section 3049, L. O. L., reads thus:

"Any law, rule, or regulation providing for the payment of any demand of whatsoever kind or nature, except only the salary of the county auditor, hereinafter provided for, out of the treasury or any fund thereof, whether from public funds or private funds deposited therein, shall always be construed as requiring the auditing and approval of such demand by the county auditor, and an order of the County Court or board of county commissioners before the same shall be paid. No order or warrant for the payment of any demand shall be valid, either in the hands of the original payee or holder, or any transferee or assignee thereof, unless the demand for which the same was issued shall have been first duly audited and approved by the county auditor, as in this act provided."

In substance, Section 3050, L. O. L., provides that no demand shall be allowed by the auditor in favor of any person indebted to the county without first deducting such indebtedness. Section 3052, L. O. L., directs that the salary of the auditor shall be audited, allowed, and

ordered paid by the board of county commissioners and that:

"All other demands on account of salaries, or otherwise, fixed by law or otherwise and made payable out of the treasury, must be approved by the auditor before being ordered paid."

Thus it is seen that the auditor "shall be the accounting officer for the county" and that all claims against the county "shall be presented to him"; that "he shall examine and audit" every claim, and after approving or rejecting it he is required to report it to the board of county commissioners. Not satisfied with the comprehensive language used in Section 3048, where it is said that "all demands, accounts or claims against the county shall be presented" to the auditor, the legislature took the added precaution of expressly saying in Section 3049, that future laws "providing for the payment of any demand of whatsoever kind or nature" shall always be construed "as requiring the auditing and approval of such demand by the county auditor, and an order of the County Court or board of county commissioners before the same shall be paid."

The command that all claims must first be presented to the auditor and audited by him before being ordered paid by the board of county commissioners is made still more imperative by Section 3049 where we read that:

"No order or warrant for the payment of any demand shall be valid, * * unless the demand for which the same was issued shall have been first duly audited"

by the county auditor. Finding as we do a statute which declares in positive and unmistakable language that a claim against the county must be presented to the auditor before it is ordered paid by the board of county commissioners, we now inquire whether the

plaintiffs must allege that they complied with the requirements of the statute by presenting their claim to the auditor.

Legislation requiring that claims against municipalities shall be presented to some designated officer or tribunal is common to all the states of the Union. It is interesting to note that while a majority of the courts hold that when a statute requires the presentation of a claim to a designated officer the fact of such presentation becomes a material matter which must be alleged in the complaint, there are nevertheless a few jurisdictions which entertain variant views. In Wisconsin it is held that legislation appertaining to the presentment of claims against municipalities is analogous to statutes of limitations and governed by like rules; and hence a failure to comply with the statute is waived unless the municipality takes advantage of the omission by demurrer or answer: *O'Connor* v. *Fond Du Lac,* 109 Wis. 253 (85 N. W. 327, 53 L. R. A. 831). Proceeding on the theory that the presentation of a claim constitutes no part of a cause of action but is merely a part of the procedure to enforce a cause of action already existing it has been ruled that the failure to present a claim is only matter for a plea in abatement: *Gillett* v. *Lyon County,* 18 Kan. 410; *Skinner* v. *Cowley County,* 63 Kan. 557 (66 Pac. 635); *Auerbach* v. *Salt Lake County,* 23 Utah, 103 (63 Pac. 907, 90 Am. St. Rep. 685). In one jurisdiction it seems to be the rule that the complaint need not allege compliance with the statute if the claim has been rejected upon the ground that the demand is not a legal charge against the municipality and no objection has been made to the manner or form of the presentment: *Taylor* v. *Canyon County,* 7 Idaho, 171 (61 Pac. 521). In Indiana it is said that failure to present a claim is

a matter of defense to be pleaded by the defendant: *Bass Foundry & Machine Works* v. *Parke County*, 115 Ind. 234 (17 N. E. 593); *Hancock County* v. *Leggett*, 115 Ind. 544 (18 N. E. 53); *Gibson County* v. *Tichenor*, 129 Ind. 562 (29 N. E. 32). However, according to the rule established by the weight of authority, where the statute requires the presentation of a claim before an action is brought to enforce its payment, the complaint must allege that the claim has been presented in the manner and form prescribed by the statute: *Bibbins* v. *Clark*, 90 Iowa, 230 (57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278); *Scarbrough* v. *Watson*, 140 Ala. 349 (37 South. 281); *Denver* v. *Bottom*, 44 Colo. 308 (98 Pac. 13); *Butts County* v. *Wright*, 143 Ga. 253 (84 S. E. 443); *Billings First National Bank* v. *Custer County*, 7 Mont. 464 (17 Pac. 551); *Jones* v. *Bladen County*, 73 N. C. 182; *Collins* v. *King County*, 1 Wash. Ter. 416; *May* v. *County of Buchanan*, 29 Fed. 4[illegible]9. See, also, *Fenton* v. *Salt Lake County*, 4 Utah, 466 (11 Pac. 611).

The question is not *res integra* in Oregon but previous adjudications have committed this court to the rule followed in most of the states. In *Richardson* v. *Salem*, 51 Or. 125 (94 Pac. 34), it was said that "the city is not in default until the conditions" of the charter are complied with. In *Graft* v. *Wilson*, 62 Or. 476, 482 (125 Pac. 1005, Ann. Cas. 1914C, 462), it was conceded that the liability of Multnomah County does not become complete until the presentation of a claim. In *Naylor* v. *McColloch*, 54 Or. 305, 313 (103 Pac. 68), it was ruled that since a charter provision akin to the statute now under discussion was "in the interest of the general public, and a matter of positive law," the council could not waive it: See, also, *Richardson* v. *Salem*, 51 Or. 125, 127 (94 Pac. 34).

2. The legislature possessed undoubted power to require that claims against the county be presented and having exercised its power by commanding that claims shall be presented to the auditor it necessarily follows that a claimant must allege and prove that he has obeyed the statute; and if the complaint does not contain this material and essential allegation the pleading will not support a judgment: *County of Union* v *Slocum*, 16 Or. 237, 239 (17 Pac. 876); *Philomath* v. *Ingle*, 41 Or. 289 (68 Pac. 803); *Stackpole* v. *School District*, 9 Or. 508; *Wallowa County* v. *Oakes*, 46 Or. 33, 35 (78 Pac. 892); *Barrow* v. *School District*, 83 Or. 272 (162 Pac. 789).

3. It is true that no demurrer was filed against the complaint and the sufficiency of the pleading was not questioned until after the verdict and judgment. The same situation was presented in *Philomath* v. *Ingle*, 41 Or. 289 (68 Pac. 803); and yet it was there decided that the complaint was insufficient to support the judgment. If the complaint contained terms sufficiently general to comprehend the essential fact of presentation to the auditor then the failure expressly to aver the fact of presentment would be cured by the verdict: *Booth* v. *Moody*, 30 Or. 222, 225 (46 Pac. 884).

4. The plaintiffs, it is true, have alleged in their complaint that they presented their claim for allowance but it is also true that they have pointed out and specified the board of county commissioners as the persons to whom the claim was presented. By expressly naming the board of county commissioners as the persons to whom presentment was made, the plaintiffs impliedly say that they did not present the claim to the auditor. Nor does paragraph VI of the complaint aid the plaintiffs; for on the authority of *Barrow* v. *School District*, 83 Or. 272, 276 (162 Pac.

789), this paragraph "is not an allegation of presentation for audit." The legislature has in its wisdom declared that claims against Multnomah County must be presented to the auditor. A claimant cannot maintain an action unless he first presents his claim to the auditor: *Philomath* v. *Ingle*, 41 Or. 289, 293 (68 Pac. 803).

5. It is true that the board of county commissioners can reject a claim which the auditor has approved; or, on the other hand, the board can approve and order the payment of a claim which the auditor has rejected; and yet, notwithstanding the fact that the ultimate authority to pay or to refuse to pay is lodged in the board of county commissioners, the demand must first be presented to the auditor before it is ripe for the consideration of the board. We do not attempt to determine whether claims arising out of torts must be presented to the auditor; but it is sufficient to say that a claimant with a demand arising out of a contract comes within the embrace of the statute and such a claimant must obey the plain mandate of the legislature before he can maintain action against the county for the enforcement of his demand. If it be said that this conclusion leads to a harsh result in a case where the demand has been presented to and rejected by the board of county commissioners and afterwards passed upon by a jury, our answer is that the courts must accept the statute as they find it.

The judgment appealed from is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

Argued November 27, 1918, affirmed February 4, rehearing granted March 11, reargued April 2, former opinion adhered to and judgment affirmed April 29, 1919.

ASHMUN *v.* NICHOLS.*

(178 Pac. 234; 180 Pac. 510.)

Landlord and Tenant—Injuries to Tenant—Sufficiency of Evidence.

1. In an action by a tenant injured by giving way of step in stairway to basement, evidence *held* to sustain a finding of negligence of the landlord, although he had employed a carpenter and the lumber had been put upon the premises to repair the steps.

Trial—Reception of Evidence—Offer of Proof.

2. There was no error in sustaining an objection to a question, where there was no showing or offer as to what would have been the proof if the witness had been permitted to testify.

[As to defective and dangerous premises showing liability of lessor for, see note in 66 **Am. St. Rep.** 785.]

ON REHEARING.

Landlord and Tenant—Failure of Landlord to Repair After Notice—Injury to Tenant—Landlord's Liability.

3. Where a landlord agreed to keep his premises in repair, the law fastened upon him such duty, and where he violated that duty after notice of a dangerous condition of steps he is liable in damages for the tenant's personal injuries caused thereby, whether the injuries were directly contemplated in the contract and the action was purely contractual, or whether it was in tort for the landlord's negligence or whether it partakes of a double nature under the Code, depending upon both tort and contract.

Landlord and Tenant—Agreement to Repair—Evidence.

4. In an action by a tenant against a landlord for personal injuries resulting from a defect in steps of which the landlord had notice, evidence *held* sufficient to support a jury's finding of an agreement by which the landlord was to repair whenever necessary to make the building safely habitable.

Landlord and Tenant—Landlord's Agreement to Repair—Consideration.

5. Evidence *held* sufficient to show that the agreement of the landlord to make repairs necessary to make the building safely habit-

*Authorities discussing the question of liability of landlord for injury to tenant from defects in premises are collated in notes in 34 **L. R. A.** 824; 34 **L. R. A. (N. S.)** 798; 48 **L. R. A. (N. S.)** 917 and **L. R. A.** 1916D, 1224.

On right of tenant to recover for personal injuries received through landlord's breach of contract to repair, see notes in 11 **L. R. A. (N. S.)** 504; 34 **L. R. A. (N. S.)** 804; 48 **L. R. A. (N. S.)** 919 and **L. R. A.** 1916D, 1227. REPORTER.

able, referred back to the original contract, and was not without consideration.

Landlord and Tenant—Personal Injuries—Defective Steps—Notice—Contributory Negligence—Question for the Jury.

6. In action by a tenant against a landlord for personal injuries resulting from dangerous condition of steps, of which the landlord's agent had been notified, and which steps he had promised to immediately repair, requesting the tenant to use the steps with care, the question of contributory negligence was one for the jury.

Negligence—Injuries from Plaintiff's Subsequent Acts—Pleading and Proof.

7. If one injured by negligence of another attempts to recover for suffering resulting from his own subsequent act rather than the original accident and presents evidence of his subsequent suffering, defendant, without any pleading and as a matter of negation, may prove that part or all of the suffering resulted from the second injury.

Trial—Exclusion of Evidence—Necessity of Statements as to What Witness Would Answer.

8. Before a party can take advantage of an error in excluding evidence, he must state to the court what he expects the answer of the witness will be, so that the court may know whether the answer excluded would have been favorable to the party offering it.

Trial—Instructions—Refusal of Instructions on Matters Covered by Others.

9. It is not error to refuse a requested instruction upon matters sufficiently covered by the general charge.

From Multnomah: WILLIAM L. BRADSHAW, Judge.

Department 2.

Plaintiff alleges that the defendant was the owner of Lot 1, Block 182, in the City of Portland; that in December, 1913, she made an oral lease thereof and of the dwelling-house thereon, at a monthly rental of $25; that the defendant promised and agreed to make certain repairs on the premises and to keep them in good condition; that on October 9, 1916, while in possession of the premises under such verbal lease, plaintiff undertook to go down the stairway leading from the first floor of the building into the basement, for the purpose of obtaining fuel; that while she was carefully and prudently going along and down said stairway,

she stepped upon the fourth tread from the bottom and it broke, gave way and injured the plaintiff; that the steps, braces and other material of which the stairway was constructed, and which were covered and hidden from the plaintiff by the steps, were old, rotten, worn out, defective and in a dangerous condition; that the defendant knew or with the exercise of reasonable care ought to have known of such defective and dangerous condition, yet carelessly and negligently failed to repair the same.

It is further averred that prior to the injury the plaintiff had complained to the defendant of the condition of the stairway and insisted that it be repaired; that the defendant had agreed to make the necessary repairs; that plaintiff relied upon such promise and was using the stairway in a careful and prudent manner at the time of the injury; that the defendant carelessly and negligently permitted the stairway to remain in a defective and dangerous condition after he had been notified thereof by the plaintiff and after he had promised to repair the same; that he violated his promise to fix and repair; that the plaintiff without any fault or negligence on her part and while rightfully upon the premises as tenant of the defendant, by reason of such defects in the stairway was violently precipitated by the falling and breaking of the said step, as the result of which she sustained certain injuries, and damages in the sum of $10,000.

The defendant filed a general demurrer to the complaint, which after argument was overruled, and then made answer, admitting that the plaintiff was his tenant from December, 1913, until after the month of October, 1916, but denying every other allegation of the complaint. As a further and separate answer he alleges that about the month of December, 1913, the de-

fendant let to the plaintiff as a tenant from month to month, without any agreement as to time and without any written lease, the premises described in the complaint; that in October, 1916, while the plaintiff was in possession thereof, "she negligently and without due care or caution attempted to go down the steps leading from the first floor of said premises to the basement thereon, plaintiff well knowing that said steps were unsafe and out of repair, which, by reason thereof, broke, gave way and caused plaintiff to fall, and plaintiff was thereby slightly injured"; and that "said negligent acts and omissions of plaintiff contributed to and caused her said accident and injury."

A reply was filed. Trial was had and the jury returned a verdict in favor of the plaintiff in the sum of $1,200. Judgment was entered thereupon, from which the defendant prosecutes this appeal, claiming that the court should have sustained his motion for nonsuit and for a directed verdict and that there was error in its ruling sustaining objections to the introduction of certain testimony in mitigation of damages. On motion of the defendant, the plaintiff declared in open court that her cause of action was founded upon tort. AFFIRMED. ADHERED TO ON REHEARING.

For appellant there was a brief over the name of *Messrs. Flegel, Reynolds & Flegel,* with an oral argument by *Mr. A. F. Flegel.*

For respondent there was a brief over the names of *Mr. W. B. Shively* and *Mr. J. G. Arnold,* with an oral argument by *Mr. Shively.*

JOHNS, J.—It appears that at the time of the leasing the building in question was very old, out of repair and in a dilapidated condition; that it was only a mat-

ter of a short time until it would have to be torn down; that it was necessary that certain improvements should be made before it would be a fit or suitable place for habitation; that certain repairs were then made and during the three-year period of the leasing the landlord continued to make minor and inexpensive repairs, and that the agreed rental was paid.

There was an old stairway leading to the basement in which the plaintiff kept her wood and vegetables. She claims that it was necessary for her to use this stairway. A short time before the accident, while plaintiff was going down this stairway the bottom step broke, by reason of which she fell but was not then injured. The complaint alleges that she then notified the defendant, through his agent, of the condition of the stairway and that he promised and agreed to make the necessary repairs immediately; that relying upon such promises she continued to use the stairway, taking reasonable care and precaution; that in fact the stairway was old, worn out and defective; that its condition was latent and concealed but should have been known and would have been known to the defendant with the exercise of reasonable care and diligence; that after receipt of the notice the defendant sent a carpenter to the premises for the purpose of putting the stairway in good condition so that it could be used safely for the purposes for which it was intended; that the carpenter made the required measurements and an estimate of the necessary material; that the lumber was then brought and placed upon the premises for the purpose of reconstructing the stairway. It appears that the lumber remained unused for about five days; that relying upon the promise of the defendant to repair, and from necessity, the plaintiff continued to use the stairway; that about the fifth day after the ma-

terial was on the ground, and without any fault or negligence on her part, while going down the stairway, the fourth step from the bottom broke, as a result of which she was violently thrown to the basement floor and sustained the injuries of which she complains.

The defendant contends that the plaintiff was injured as a result of her own carelessness and negligence, and that relying upon a tort she is not entitled to recover. The plaintiff testified:

"I told him it would have to be kept in repair or I could not live there, and he said they would keep it in repair."

Mr. De Graff, agent for the defendant, when asked about the agreement to make repairs, replied:

"Not that I remember of, except as I said before, that we would not make any repairs to it unless it was absolutely necessary to make it habitable."

The fact remains that the plaintiff used and occupied the building as a residence; that the defendant took and accepted her monthly rental; that it was necessary to use the stairway in going to and from the basement; that the plaintiff testifies that she notified the defendant of the condition of the stairway prior to the accident and that he promised to make the necessary repairs; that he actually sent a carpenter and bought the material for that purpose; that the lumber was purchased and placed upon the ground at least five days before the accident.

Among others, the court gave the following instructions:

"The question of what is a reasonable time is for the jury to determine. * *

"Defendant would have a reasonable time, after knowing or being notified of the repairs being necessary, in which to have made them, before he could

be held responsible for injuries resulting therefrom. * *

"If you find from the evidence the accident complained of was in any degree owing to the want of due care and caution on the part of the plaintiff directly contributing to said accident, then your verdict must be for the defendant. * *

"If you find from the evidence that the plaintiff knew the steps were unsafe and out of repair, but did not know that the particular step which broke was out of repair, then it is for you to determine from the evidence whether or not the plaintiff in venturing on the step which broke, without investigating its condition, was exercising due and ordinary care for her own safety. The plaintiff is not entitled, knowing or having good reason to suppose she was incurring danger in so doing, to go upon the steps, relying on the defendant being responsible for the steps being safe; but must act in a reasonable and prudent manner.

"You cannot find a verdict for plaintiff in any sum unless you determine, first, that there was a contract between plaintiff and defendant, or defendant's agent, that defendant would make the repairs on the stairway. Second, that the defendant or his agent, the Portland Trust Company, after being informed and knowing the existence of the defect in the stairway, and promising to repair the same, failed to use that degree of diligence which a man of ordinary prudence would have used under like circumstances to repair the defect. Three, that the defect of which defendant or his agent was so notified or informed and so neglected to repair, was the cause of plaintiff's injury."

1. Under such instructions the jury found for the plaintiff and there is sufficient evidence to sustain the verdict.

We think the law of this case is laid down by the Supreme Court of Washington in *Mesher* v. *Osborne*, 75 Wash. 439 (134 Pac. 1092, 48 L. R. A. (N. S.) 917), where it is held:

"In some of the earlier cases holding that an action of tort did not arise on a breach of the covenant in the case presented, the general expressions used would include the proposition that no such action could arise. But it is believed that, restricting those cases to the issue presented, there is nothing to exclude general harmony on the proposition where there is a covenant by the landlord to keep the premises in safe and tenantable condition, and the landlord has knowledge or notice of the existence of such defects as render the use of the property in the manner contemplated by the lease dangerous to the tenant, and the tenant, his guests or family, suffer personal injury therefrom after a reasonable time for making the premises safe, since such notice or knowledge, in the absence of contributory negligence, the landlord is liable to an action of tort therefor."

2. The defendant called Mayme Kube, the head nurse of the hospital where the plaintiff was receiving medical care after her injuries, as a witness and asked her this question:

"What condition is indicated by the chart, or what do you know from personal memory of the facts, as to her obeying directions, or as to her being refractory?"

Upon an objection to this question, counsel for defendant stated:

"Our object is to explain as far as possible to what extent the condition we find is due to the injury and to what extent it is due to other things. It would all bear on the good faith of the patient, and explain the results."

The court sustained the objection, upon the ground that such matters had not been pleaded as an affirmative defense. The defendant did not offer the chart in evidence and did not offer to produce any evidence as to who kept the chart or made the entries thereon, whether the chart was authentic or the purposes for

which it was kept. In *First Nat. Bank.* v. *Oregon Paper Co.*, 42 Or. 398 (71 Pac. 144, 971), this court held:

"If the appellants were not allowed to prove their claims, they should have called witnesses, and stated to the court the testimony which it was expected would be elicited from them."

After citing the above case with approval, the opinion in *Columbia Realty Investment Co.* v. *Alameda Land Co.*, 87 Or. 277, 291 (168 Pac. 64, 68), lays down this rule:

"We think the better practice is to call the witnesses relied on and ask appropriate questions. If objections are sustained to these questions the time is ripe for an offer of proof."

Assuming that the defendant could make this defense under general denial, there was no showing or offer as to what would have been the proof if the witnesses had been permitted to testify, and for such reason there was no error in sustaining the objection.

Every element of defense was fully covered by proper instructions and the vital question of fact was: What would be a reasonable time within which the defects in the stairway should have been repaired, after the defendant received notice of such defects? The jury found for the plaintiff. The judgment is affirmed. AFFIRMED. ADHERED TO ON REHEARING.

McBRIDE, C. J., and BEAN, J., concur.

OLSON, J., took no part in the consideration of this case, his term having expired.

Former opinion adhered to and judgment affirmed April 29, 1919.

ON REHEARING.

(180 Pac. 510.)

In Banc.

This cause of action arose out of injuries received by the plaintiff, caused by the giving way of the basement steps in a house which she was renting from the defendant, precipitating her to the basement floor, and wounding her more or less seriously upon projecting nails.

The case has been once heard in Department No. 2, and now comes up for rehearing before the full court.

FORMER OPINION ADHERED TO.

On rehearing, for appellant there was a brief over the name of *Messrs. Flegel, Reynolds & Flegel,* with an oral argument by *Mr. John W. Reynolds.*

For respondent there was a brief over the names of *Mr. W. B. Shively* and *Mr. J. G. Arnold,* with an oral argument by *Mr. Shively.*

BENNETT, J.—We are met at the threshold of the case by the urgent claim of defendant, that this is an action in tort, and that the tenant cannot recover against the landlord in such an action, or indeed at all, for personal injuries caused by a failure to repair, even where there is an agreement on the part of the landlord to repair, but that the only remedy of such tenant, is directly upon the contract, for the breach of the same, in which action (as is claimed) such a personal injury would be too remote and not within the contemplation of the parties.

Upon this question of whether a tenant can recover against the landlord for a personal injury under such circumstances, the authorities are very much divided. At common law, and even under the Codes, a great deal of labor has been expended, and much learning applied in the attempt to exactly and accurately define a tort, and to distinguish it from a mere breach of contract. The real meaning of "tort" has been found so elusive and nebulous, that while many courts and text-writers have attempted to fix exactly its scope and limitations, and its relations to contract rights, yet none of their definitions and limitations have been found sufficiently accurate to be generally accepted: 38 Cyc. 415.

In *Hayes* v. *Mutual Life Ins. Co.,* 125 Ill. 626 (18 N. E. 322, 1 L. R. A. 303), a tortious act is defined as,

"The commission or omission of an act by one, without right, whereby another receives some injury."

It is sometimes defined as synonymous with "private wrong," "private injury" or "civil wrong": *Rhobidas* v. *Concord,* 70 N. H. 90 (47 Atl. 82, 185 Am. St. Rep. 604, 51 L. R. A. 381). Bishop, in his work on Noncontract Law, after defining it as a civil wrong inflicted otherwise than by a mere breach of contract, says:

"To be more nicely accurate, a tort is one's disturbance of another in rights which the law has created, either in the absence of contract or in consequence of a relation which a contract has established between the parties."

In *Rich* v. *New York Cent. etc. Ry. Co.,* 87 N. Y. 382, Judge FINCH says:

"We have been unable to find any accurate and perfect definition of a tort. Between actions clearly *ex delicto* and those as clearly *ex contractu* there exists

what has been termed a border land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other and become so nearly coincident as to make their practical separation somewhat difficult."

Perhaps under our Code systems, we should not attempt to place too much stress upon a somewhat arbitrary and ill-defined distinction between torts and contracts. It is a theory of the Code procedure that a party shall have full redress for all legal wrong, whether the wrong results from a breach of contract or from a breach of more general law. It is obvious that many times, and in many cases the injury will depend partly upon contract and partly upon a tort or wrong. In an action against a carrier of passengers the right of the injured passenger depends entirely upon his contract to be carried safely, and he could not recover without such contract either expressed or implied, and yet superimposed upon the contract is the wrongful and negligent breach, causing an injury to his person, which was not directly contemplated by the contract, and for which the contract provides no measure of damages. To say that the passenger must separate the two, and depend wholly upon the negligent wrong, on the one hand, or the mere breach of contract alone on the other, would be to deprive him effectually of a complete remedy.

3. In a case like this we think that when a landlord agrees to keep his premises in repair, the law fastens upon him a *duty* to keep that contract, and if he violates that duty, after notice of the dangerous condition, he ought in principle to be liable for whatever injuries the tenant naturally and necessarily receives from such breach of duty. If the only injury is one directly contemplated in the contract, as the decreased value of the use of the premises, the action of the tenant

would be purely upon the contract. But if the negligence of the landlord resulted, necessarily and naturally, in some further injury to his person or property, he may bring an action, like the one at bar, and it is of little importance whether it is called technically an action on contract or an action upon the tort, or whether it partakes of a double nature, depending upon both tort and contract.

It is true there are many authorities which can be cited against this view. A great many of these are presented in the very exhaustive brief of the learned attorneys for appellant. It may be that in mere numbers, the burden of authority is that way. But the law upon this point is in a state of change, and we think the better rule, and that declared by the majority of the later cases, sustains a recovery by a tenant against the landlord for personal injuries caused by a failure to repair where the landlord has directly promised and agreed to make the necessary repairs, and had notice of the dangerous condition.

The authorities are so numerous on each side that it would be unnecessary labor to attempt to segregate and compare them.

Among the very late cases supporting the rule as we have stated it are those of *Mesher* v. *Osborne,* 75 Wash. 439 (134 Pac. 1092, 48 L. R. A. (N. S.) 917), and *Ehinger* v. *Bahl,* 208 Pa. St. 250 (57 Atl. 572).

It is urged on rehearing that the Washington case, *supra,* does not really declare this doctrine, but only quotes the same from the work of Shearman & Redfield on Negligence, but we think the court intended to make that quotation a part of its opinion. The court had already said:

"Where there is a general duty, even though it arises from the relation created by, or from the terms of the contract, and that duty is violated, either by

negligent performance or negligent nonperformance, a landlord may be held as for a tort. Between landlord and tenant, as in other relations, there is always the general duty to so use one's own as not to injure another."

And then the court, after reviewing the authorities, quotes, as it seems to us, with complete and expressed approval, the language from Shearman & Redfield, as follows:

"A carefully compiled and discriminating text, after noting the hopeless conflict of the authorities and the hairsplitting distinctions indulged by some of the courts, uses the following language: ' * * The law on the subject is in a state of transition. In some of the earlier cases holding that an action of tort did not arise on a breach of the covenant in the case presented, the general expressions used would include the proposition that no such action could arise. But it is believed that, restricting those cases to the issue presented, there is nothing to exclude general harmony on the proposition where there is a covenant by the landlord to keep the premises in safe and tenantable condition, and the landlord has knowledge or notice of the existence of such defects as renders the use of the property in the manner contemplated by the lease dangerous to the tenant, and the tenant, his guests or family, suffer personal injury therefrom after a reasonable time for making the premises safe, since such notice or knowledge, in the absence of contributory negligence, the landlord is liable in an action of tort therefor. In those jurisdictions where damages for personal injuries are held recoverable against the landlord for injuries caused by the want of repairs he had agreed to make, and of the necessity of which he had been notified, it is said that the nature of the covenant is such as naturally to create a reasonable anticipation that the neglect to perform it will probably be the cause of personal injuries being inflicted on the tenant, his guests, family, and servants; that the covenant gives rise to a corresponding duty either to exercise such supervision as may be necessary, or to

act with requisite promptness on notice, as the case may require; and that an action of tort is maintainable for the injury consequent on the neglect to perform it, the covenant being set up as a matter of inducement. * * *"

The Pennsylvania case, *Ehinger* v. *Bahl,* 208 Pa. St. 250 (57 Atl. 572), is almost exactly on all-fours with this case. There the plaintiff had discovered a crack in the building he was occupying, and had notified the defendant, who was the owner of the building, and who promised to have it fixed right away. She did not do so, but put off the repairing and was notified again, and again promised to take care of it but did not do so, and the building fell and caused a serious damage to plaintiff's goods. The plaintiff was nonsuited in the court below, but the decision was reversed in the appellate court in a careful and well-considered opinion.

4. In this case we think it clearly appears that there was evidence from which the jury might find that there was a general contract, at the time plaintiff went into the building, that the defendant would make such repairs from time to time as were necessary to make the building habitable, and that in pursuance of that arrangement plaintiff, when the steps became unsafe, went to the defendant and to his agent, and notified him of the condition the steps were in. The defendant's agent came and looked at the steps. Amber Ashmun, daughter of the plaintiff, testified:

"Well, he looked at the steps and he said he would have them fixed immediately."

Mr. De Graff, agent of the defendant, practically admits this, saying:

"When we were at the bottom (of the steps) I told her I would *order them fixed right away,* and that she should be careful in the meantime."

Defendant himself, testified:

"Mr. De Graff had his orders to repair everything that was a necessity."

Under this evidence the jury might well find an agreement to repair whenever necessary to make the building safely habitable.

5. However, it is urged that this agreement was without consideration, but we do not think this contention can be sustained.

The plaintiff, testifying in regard to the original contract to make necessary repairs, says:

"I told him he would have to have the house kept in repair or *I could not live there,* and he said they would keep it in repair."

And again in cross-examination:

"Q. What was necessary at that time to be done, they were willing to do to keep you as a tenant?

"A. Yes, they were willing to keep it in repair."

It appears from the evidence that the defendant was receiving $25 per month for the use of the premises, and we think the jury could infer, that the agreement to fix these particular steps, referred back to the original contract and had reference thereto, and that the continued occupation by the tenant, and the payment of the rent, was a sufficient consideration.

Upon this question the case of *Ehinger* v. *Bahl,* 208 Pa. St. 280 (57 Atl. 572), from the Pennsylvania Supreme Court, already cited, is directly in point, in which the court said:

"It is argued there was no valid contract to repair. We think there was a valid contract, and a good consideration for it; he was induced to remain because she promised to make substantial, possibly extensive repairs; she secured a desirable tenant who would have abandoned the property that day if she had not made

the promise; the promise was not to be performed in the indefinite future, but the same day it was made. It is argued there was no promise which bound the tenant. We think there is a reasonable inference of a promise which the jury might have drawn, that he was to remain and pay rent for at least a month longer; for, it should be noted, he was not bound to stay a day at the peril of himself, family and goods, and she promised to relieve him of the peril that very day. The mutual promises, if as alleged, constituted a sufficient consideration; but resting wholly in parol what they were and what the parties meant was for the jury."

6. The question of contributory negligence was clearly one for the jury. When plaintiff found the steps were in a dangerous condition she was in the actual occupation of the premises with her family and household goods. She had the choice of remaining until the repairs were made, or attempting to remove to some other place. To do the latter she would first have to find a place to which she could remove. She had the landlord's general promise to repair. She notified him at once about the dangerous condition of the steps, and he promised to repair them *immediately*. Under these circumstances, according to her testimony, she remained on the premises, using the steps carefully. We think it was clearly a question for the jury as to whether she was negligent in so doing, and as to whether the defendant was negligent in delaying to repair.

The case was analogous to the case of a servant who, finding a dangerous condition, notifies the master of that dangerous condition, and upon the master's promise, returns to his work, depending upon the master to repair. In such cases it has been generally held that contributory negligence is a question for the jury.

7. There seems to be only one other serious question present in the case at bar, namely; whether or not there was reversible error in the ruling of the court excluding the testimony of Miss Mayme Kube. The record of the case in that matter was as follows: The witness, having qualified herself as being a nurse at the hospital, was asked:

"Q. What condition is indicated by the chart, or what do you know from personal memory of the facts, as to her obeying directions, or as to her being refractory?

"A. Well, she would remove the dressings from her legs when the nurse asked her not to—

"Mr. Arnold (Interrupting): Just a minute. I do not understand that there is any carelessness or negligent treatment pleaded in this action at all, and I don't think that would be competent under the pleadings in the case. I understand the purpose is to show she was careless and negligent in treating herself?

"Mr. Reynolds: Our object is to explain, as far as possible, to what extent the condition we find is due to the injury and to what extent it is due to other things. It would all bear on the good faith of the patient, and explain the results.

"The Court: I think the rule of law is that you must plead that. Do not understand the court to say that you have not a right to show what her condition was; but if her condition was brought about by some treatment, you should state that, just the same as if you claimed her condition came from some inherent disease she had. That will be the ruling of the court. Objection sustained.

"Mr. Reynolds: I will save an exception."

We do not think it was necessary to plead, that part of the injuries for which plaintiff was complaining, was caused by the subsequent act of the plaintiff, rather than by the original accident. This was not "contributory negligence." It was simply an affirma-

tive way of showing that part of the suffering of which plaintiff had complained in her evidence, did not result from the accident at all, but from her own subsequent acts. It is apparent that if a man suffers a broken arm, by reason of the negligence of some other person, and when he is about well breaks it again, either willfully or accidentally, he cannot recover for the second injury, from the person liable for the first; and if he attempts to do so, and presents to the jury evidence of his subsequent suffering, the defendant, without any pleading and as a matter of mere negation, has a right to prove that part or all of the suffering actually or probably resulted from the second injury.

This was the conclusion reached in the opinion of Mr. Justice BENSON in *Theiler* v. *Tillamook County*, 81 Or. 277 (158 Pac. 804), where a similar question was involved, and with the reasoning of that opinion we are entirely satisfied.

8. A close question, however, arises as to whether the defendant disclosed sufficiently to the court, what the testimony, which was not admitted, would have been, and whether or not it would have been favorable to the defendant.

This court has repeatedly held that before a party can take advantage of an error of this kind, he must state to the court what he expects the answer of the witness will be. This is not only for the purpose of first advising the trial court, but it is also necessary so that this court, may know whether the answer excluded would have been favorable to the party offering it, and, therefore, would justify a reversal and new trial. For instance, in this case it might be that in the event of a reversal and new trial this same witness being called and permitted to testify, might say that she knew nothing further, or that they were about to take

the bandages off anyway and it did not make any difference in her condition.

It will be noticed the court made no order excluding the answer of the witness already given, and there was no offer to show that she could have testified to any further fact, or whether her testimony would have been favorable to the defendant.

In the case of *Hill* v. *McCrow,* 88 Or. 299 (170 Pac. 306), a question was presented almost exactly similar, and the record was much in the same condition. A witness having been asked if he had had a conversation with a certain Mr. Keyt, was asked:

"State to the court now what the conversation was.

"Counsel for plaintiff objected as incompetent, irrelevant and immaterial, and a matter after the transaction was closed."

Thereupon, counsel for defendant stated:

"If the court please, it is like this, they are claiming a W. E. Davidson & Co. was the owner of this note and Mr. Keyt was trying to arrange a disposal of that note to Mr. McCrow. That is what we wished to show. * * This, of course, occurred the day before Hill claims to have got the note."

The court sustained the objection, to which an exception was saved. Upon appeal the court said:

"The record does not disclose what the answer of the witness would have been had he answered. The offer is a general statement of the fact that it was expected to show, but it does not appear whether the evidence of the witness would prove such fact or not. We cannot say from the record that there was any material evidence excluded or that there was any prejudicial error."

To the same effect is *Kelly* v. *Highfield,* 15 Or. 277 (14 Pac. 744); *Strickler* v. *Portland Ry. L. & P. Co.,* 79

Or. 526 (144 Pac. 1193, 155 Pac. 1195), and many other Oregon cases.

It is the opinion of a majority of the court that the defendant did not come within the rule thus so frequently laid down by this court, in showing that testimony *favorable to the defendant* was actually excluded by the court.

9. The same question was sought to be raised by an instruction requested by the defendant. While the instruction asked for was not given, the court seems to have sufficiently covered the same proposition by its general charge, in which the court said:

"It is therefore necessary for the plaintiff to prove by a preponderance of the evidence that any injury or ailment from which she may be suffering, were caused by the defendant's negligence before she can recover any damages therefor, and if it should appear from the evidence that any of plaintiff's suffering may be attributed to some other cause, than the negligence of the defendant, then she is not entitled to have such particular considered in your appraisement of damages."

There being no reversible error, our former opinion is adhered to and the judgment is affirmed.

FORMER OPINION APPROVED AND JUDGMENT AFFIRMED.

Argued April 3, remanded with directions April 29, 1919.

NEILSON *v.* TITLE GUARANTY & TRUST CO.

(180 Pac. 517.)

Pleading—Answer—Evidentiary Matter.

1. In suit to compel the application of municipal warrants to satisfaction of certain judgments, where answer of certain defendants alleged partnership with judgment debtor and interest in the warrants, the making of an order requiring such answer to be made more definite by setting forth nature, character, and amount of consideration or capital furnished by each partner was error; such details being merely evidentiary.

Pleading—Order Striking Out Answer—Failure to Make More Definite—Service of Order.

2. Where order required answer to be made more definite by amendment made within stipulated time from service of order upon defendants, it was error to strike answer from files upon defendants' failure to amend answer, where order was never served upon them.

Pleading—Answer—Amendment—Unintentional Denial.

3. In application to compel application of municipal warrants to satisfaction of certain judgments, where complaint alleged that certain defendants claimed an interest in the warrants, the court erroneously refused such defendants permission to amend their answer so as to admit such allegations instead of denying them; it being apparent that such denial was unintentional.

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 1.

This is a suit to compel the application of certain municipal warrants of the City of Rainier to the satisfaction of certain judgments, and to determine the rights of the several litigants in and to such warrants. The history of the involved transactions, as developed by the record, is about as follows: In the year 1909, the defendant Masters entered into a contract with the City of Rainier for the paving of certain streets, in which contract the defendants Howard and Moody were silent partners with Masters. When the work was completed a controversy arose between Masters and the city as to the balance due under the contract. Thereupon in June, 1917, Masters began an action in the federal court against the city to recover an alleged balance of $13,180, in which he obtained a judgment for the amount claimed. In 1911, after the cessation of work upon the municipal contract above mentioned, Masters entered into a contract with the plaintiff Neilson whereby he undertook to clear, plow, and prepare certain lands near Mosier, Oregon for the planting of an orchard. To insure the performance of the work Masters gave Neilson an undertaking with the defendant Title Guaranty & Surety Company as surety.

Masters began work upon this contract, but later abandoned it, and left the state, and Neilson began litigation against Masters and the Title Guaranty & Surety Company, in which he sought to recover damages for the breach of the contract. This action was twice tried in the Circuit Court, resulting both times in judgments in favor of Neilson, and each time the judgment was reversed upon appeal: 72 Or. 463 (143 Pac. 1132, and 81 Or. 422 (159 Pac. 1151). Thereafter Neilson prosecuted his action against Masters only, securing service of summons by publication, and a judgment by default. The Title Guaranty & Surety Company also began action against Masters, in which it sought to recover the moneys expended by it in the litigation above referred to. In this case also, the service of summons was by publication, and the judgment went by default. When each of these last-mentioned actions was begun, the action of Masters against the City of Rainier was pending and undisposed of, in the federal court. In the case of *Neilson* v. *Masters*, the substituted service of summons was based upon an affidavit, which alleges:

"That a cause of action exists in favor of the plaintiff and against the defendant above named, and the subject of the action is to recover damages for the breach of that certain contract wherein defendant promised to clear and plow Lots 1 to 12 inclusive, of Buena Vista Orchards, situated in Mosier, Wasco County, Oregon, and that the defendant has caused a writ of attachment to issue out of the above-entitled court to the Sheriff of Columbia County, and that the said Sheriff has duly attached any and all moneys due or owing from the City of Rainier to the defendant above named. That said debt due from the said City of Rainier, to the defendant herein, is now the subject of certain litigation now pending in the United States District Court for the District of Oregon."

This allegation is followed by a detailed statement of the facts constituting the cause of action, and averments which go to show that the defendant is not within the State of Oregon, but resides and is within the State of Washington. The only reference to any property in Oregon, belonging to the defendant is in the quotation above set out.

In the case of *Title Guaranty & Surety Company* v. *Masters,* the affidavit upon which the order for publication of summons is based, is too long to be set out here, but it contains, after a recital of the facts constituting the cause of action, allegations that the defendant was not within the State of Oregon, and was a resident of Glennie, Alcona County, Michigan, at the date of making the affidavit, and that service of summons could not be had other than by publication. The affidavit is silent as to whether or not the defendant has any property within the State of Oregon.

The complaint in the instant case, after reciting the rendition and docketing of plaintiff's judgment, including a judgment against the City of Rainier, as garnishee defendant, alleges that plaintiff took the necessary steps to entitle him to demand a warrant for the amount of his judgment, from the City of Rainier, and made such demand, which was refused. There is then set out the substance of certain proceedings in *mandamus* which were had by the plaintiff in the case of *Masters* v. *City of Rainier,* in the federal court, to compel the city to issue to that plaintiff warrants in satisfaction of his judgment theretofore obtained in that court, and that it was agreed between the several judgment creditors already named, by their several attorneys, that Neilson and Title Guaranty & Surety Company would recognize the prior right of the defendant R. C. Nelson and R. C. Wright, attorneys for

Masters, to the sum of $4,426.15 as attorneys' fees in the federal court litigation, and that Neilson and the Title Guaranty & Surety Company should assert the claims of their judgments only as to the balance of the money paid by the city in satisfaction of Masters' judgment against it. The City of Rainier and the defendant Nelson also entered into an agreement in pursuance of the foregoing understanding, that the city should issue three warrants, payable to R. C. Nelson, as attorney for Masters, in the respective amounts of $4,426.15, $6,704.25, and $2,049.95, to be delivered to the clerk of the federal court, who should deliver them to Nelson to be by him held in trust for the benefit of the several parties and whomsoever else might have any interest in them. It is further averred that Nelson still holds the warrants, and refuses to assign them to the other parties to the agreement, in accordance with the terms thereof, although all the precedent conditions have been performed.

The only place in the complaint wherein the appellant, Moody, is mentioned, is paragraph XI, which reads thus:

"XI. Plaintiff further alleges that he has been informed and believes, and upon such information and belief alleges that the defendants Moody and Howard now assert and claim to have some interest in the warrants thus issued by said City of Rainier in satisfaction of said judgments, but plaintiff is unable to state the exact interest or claim alleged or asserted by said defendants therein, and plaintiff is further informed by defendant Nelson that his refusal to deliver said warrant to plaintiff is by reason of said claim made upon him by said defendants Moody and Howard."

The prayer asks that defendants Howard and Moody answer and set up the exact claim or interest which they may have in the warrant for $6,704.25, and

that such claim be decreed to be invalid; that defendants Masters and Nelson be decreed to have no interest in said warrant; that plaintiff be decreed to be the owner and entitled to the possession thereof; that Nelson be directed to deliver it to plaintiff in satisfaction of his judgment against Masters; that Title Guaranty & Surety Company be required to take the necessary steps to entitle them to the ownership and possession of the warrant for $2,049.95, and that Nelson be restrained from negotiating either of such warrants or disposing thereof, otherwise than as prayed in the complaint.

To this complaint, the defendants Moody and Howard answered jointly, admitting paragraphs 1 and 2 thereof, which allege the corporate character of the City of Rainer and Title Guaranty & Surety Company and meet the other allegations, including paragraph XI, *supra,* with a general denial. This is followed by an affirmative answer, in which it is alleged that these defendants and Masters entered into a special partnership relating to Masters' contracts for paving streets in Rainier, the terms of which are set out as follows:

"That, without any formal writing thereof and therefor, it was then and there mutually agreed by and between the defendants Masters, Howard and Moody that each of said three defendants should furnish and provide cash or valuable consideration to the extent of one third of the total capital required, or which should be required or used, to perform the aforesaid agreements thus executed by and between the said city and the defendant Masters for himself and these defendants. That the defendants Howard and Moody did perform their agreement with defendant Masters and with each other in respect to each providing his aforesaid proportion of capital for said undertaking with the City of Rainier."

It is then alleged that a subsequent arrangement was made between them whereby it was agreed that Masters and Howard should each have 20/53 interest in the business, and Moody 13/53.

Recitals follow, regarding the action prosecuted by Masters in the federal court in which they say Masters was acting for himself and as trustee for them; that after judgment was obtained therein, Masters and Howard assigned their interests in such judgment to defendant Moody, and that defendant Nelson had notice of such assignments. They concede that the warrant for $4,426.15 rightfully belongs to Nelson and Wright, and assert that the remaining two warrants belong to Moody, and pray for the dismissal of the suit.

On June 25, 1918, plaintiff filed the following motion:

"Comes now the plaintiff and moves the court for an order requiring defendants Howard and Moody to amend their amended answer and particularly paragraph II of their second further and separate answer therein, and to make the same more definite and certain.

"First: By setting forth in greater detail and in more specific terms the amount, if any, of cash capital or funds contributed or furnished by each of defendants Howard and Moody to defendant Masters, but if no cash was furnished or contributed by said defendants, or either of them, but in lieu thereof valuable considerations were furnished or contributed, then to set forth the exact nature of such valuable considerations, and further to set forth when and where such valuable considerations or said cash were furnished to said Masters.

"Second: Plaintiff further moves the court to require said defendants to amend said paragraph and to make the same more definite and certain by setting forth whether the notices or information to said City of Rainier as pleaded in lines 26 to 28 of page 3, and

lines 1 to 4 of page 4 of said amended answer were in writing, and if so by whom and to whom, or to what officer or agent of said City the same were given, and the dates of delivery of such notices or information."

On June 28, 1918, plaintiff filed this motion:

"Comes now the plaintiff and moves the court for an order requiring defendants Howard and Moody to amend their amended answer, particularly paragraph II of their second further and separate answer therein, and to make the same more definite and certain in this, by setting forth in greater detail and in more specific terms, and to state definitely whether or not the defendants Howard and Moody were to provide cash, and if so, how much, or whether the defendants Howard and Moody were to provide other valuable considerations, and if so, the nature and extent and character of such valuable considerations, and whether such valuable considerations consisted of services and labor or material; also to state in greater detail and in more specific terms the exact nature, kind, character and description of the capital provided or furnished by each of said defendants in said undertaking of said Masters with said City of Rainier.

"The purpose of this motion being to require said defendants to state in exact and definite language and terms whether or not said defendants Howard and Moody furnished the said Masters cash, and if so, how much, or whether said defendants furnished labor, material or services, and if so, the kind, character and nature thereof, and value of the same to the end that plaintiff may reply to said answer."

And on June 29, 1918, the court made the following order:

"The above cause coming on to be heard upon motion of plaintiff's attorney for an order requiring defendants Howard and Moody to amend certain portions of paragraph II of their second, further and separate answer, and to make the same more definite and certain, and the court having considered the same, it is by the court

"Ordered, that said paragraph II, and particularly the allegations therein contained in lines 26, 27 and 28, of page 3, and lines 1, 2, 3, and 4 of page 4, and make the same more definite and certain by setting forth therein to whom or to what officer or agent of said City of Rainier the notice or information of the rights, interests and ownership of the defendants Howard and Moody in and to parts of the payments, or consideration to be paid by said City of Rainier, was given, and that said amendment be made within five days from the date of this order."

And again, on July 3, 1918, the court made another order, as follows:

"The above cause this day coming on to be heard upon motion of the plaintiff by his attorney, to require the defendants Moody and Howard to amend paragraph II of their second further and separate answer as set forth in their amended answer herein, and to make certain allegations therein more definite and certain, and the court being fully advised therein, it is by the court

"Ordered, that within five days from the entry of this order and service thereof upon them, defendants Moody and Howard be, and they are hereby required and ordered to amend their amended answer herein, and particularly paragraph II of their second further and separate answer, as herein pleaded, by setting forth therein the nature, character, and the amount of the consideration or capital furnished by each of said defendants Moody and Howard to their codefendant Masters, under their said agreement with defendant Masters, and to state whether such consideration or capital so furnished by each of said defendants Howard and Moody to said Masters consisted of cash, and if so, to state the amount of cash so furnished, but if said consideration or capital consisted of labor or materials, or other considerations, to state the amount, the value, and the character of such labor, materials or other considerations so furnished by each of defendants Howard and Moody to said Masters under the said agreement as set forth in paragraphs I and II of

their second and further separate answer contained in their amended answer."

No service of this order has ever been made upon these defendants or their attorney. And no reply to defendants' affirmative answer has ever been filed.

The defendant Title Guaranty & Surety Company answered, admitting the allegations of the complaint, and, in turn, plead that they have a valid, unpaid judgment against Masters, and in substantially the same form as in the complaint, set out their right to have the warrant for $2,049.95 decreed to be the property of this defendant and decreeing that defendant Nelson assign the same to it.

Nelson also answers, in substance, that he has the warrants, claims to be the joint owner, with R. C. Wright, of the one for $4,426.15, and that he is ready to dispose of the others in accordance with the decree of the court.

The City of Rainier was permitted to intervene for the purpose, it appears, of protecting itself from any untoward accident as "an innocent bystander."

When the case was called for trial, on September 17, 1918, the plaintiff announced the death of defendant Howard, and moved for a dismissal as to him, and further moved the court to strike from the files the affirmative answer of the defendants Howard and Moody, for the reason that they had failed to amend the same by making it more definite and certain, in compliance with the order of the court. This motion was allowed by the court, and thereupon, the plaintiff moved for judgment upon the pleadings as against these defendants, for the reason that the affirmative answer had been stricken out, and the general denial, covering the allegations of paragraph XI of the complaint, left these defendants without any interest in

the litigation. This motion was also allowed. At this point, the attorney for Howard and Moody applied to the court for leave to amend his answer by admitting paragraph XI of the complaint, which was refused. On September 20, 1918, defendant Moody filed a written motion, supported by the affidavit of his attorney, R. C. Wright, for leave to amend his answer by admitting paragraph XI of the complaint, urging that the denial thereof had been made inadvertently and unintentionally. This motion was also denied.

The trial was had as between the other litigants, on September 17th, resulting in a decree in favor of plaintiff and defendant Moody appeals.

REMANDED WITH DIRECTIONS.

For appellant, N. M. Moody, there was a brief and an oral argument by *Mr. Robert C. Wright.*

For respondent, William Neilson, there was a brief over the names of *Mr. J. W. Kaste* and *Messrs. Bauer, Greene & McCurtain,* with an oral argument by Mr. *Kaste.*

For respondent, Title Guaranty & Trust Co., there was a brief presented over the name of *Mr. John K. Kollock.*

For respondent, City of Rainier, there was a brief presented over the names of *Mr. Fred W. Herman* and *Messrs. Norblad & Hesse.*

BENSON, J.—1. From the foregoing statement of facts, it appears that the court made and entered two orders requiring the defendants Moody and Howard to make their answer more definite and certain. We shall refer only to the one made on July 3d, as that, being the later, superseded the earlier mandate. The

plaintiff was not entitled to this order, and it was error to make it, since the allegation of partnership and the interests of the partners therein is clear and explicit and the additional details demanded, if of any value, are merely evidentiary: *Multnomah County* v. *Willamette Towing Co.*, 49 Or. 204 (89 Pac. 389).

2. Even if the order had been a proper one, it was error to strike the answer from the files for a failure to make the required amendment, for the defendants were not then in default, since the order itself directs that the amendment shall be made within five days from the service upon them of the order, and such service has never been had.

3. The defendant Moody should have been permitted to amend his answer by admitting the allegations of paragraph XI of the complaint. It does not require an affidavit to disclose the fact that this denial was unintentional. A mere reading of the further and separate answer establishes that fact beyond controversy.

It thus appears that the cause has never been tried upon any issue joined between the real adversaries herein, and the record is so incomplete that it must be sent back in order that the answer of the defendant, Moody, may be amended, and that replies may be filed to the affirmative matter therein.

It is doubtful whether the judgments upon which the claims of the plaintiff and defendant Title Guaranty & Surety Company are based, are valid and of sufficient force to support a decree, but, in the first instance, that question should be determined by the trial court. The cause is remanded for further proceedings not inconsistent herewith.

REVERSED WITH DIRECTIONS.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Argued April 22, affirmed May 2, 1919.

JACOBS *v.* JACOBS.

(180 Pac. 515.)

Partition—Nature of Proceeding.

1. A suit for the partition of real property is a statutory proceeding.

Judgment—Res Adjudicata—Defenses Which Might have been Urged.

2. One who sued for the partition to real property under Sections 435, 436, 440, 441, L. O. L., his pleadings being silent as to rents, issues and profits, cannot complain, in a subsequent action by the defendant for rents, issues and profits, that the plaintiff should have set up such matter in his answer in the partition suit.

Partition—Nature of Proceeding—Issues—Incidental Relief—Rents and Proceeds.

3. The primary purpose of Sections 435, 436, 440, 441, L. O. L., relating to partition, is to ascertain and determine the title to real property only; and, while it may be true that under proper allegations the question of rentals and proceeds would become an incident to a partition suit and could be settled by a decree, in the absence of proper allegations, such questions could not be adjudicated.

[As to collateral attack upon and titles determined by decree in partition, see note in 124 **Am. St. Rep.** 713, 715.]

From Linn: GEORGE G. BINGHAM, Judge.

Department 2.

The plaintiff alleges that between November 24, 1914, and May 22, 1916, she was the owner in fee simple of an undivided one-third interest in the Calvin P. and Elizabeth Jane Burkhart donation land claim in Linn County; that the defendant was the owner of an undivided two-thirds interest therein and that between the dates mentioned the defendant excluded the plaintiff therefrom and held and enjoyed the sole possession thereof and leased and rented the same, collected the rental, retained and converted the proceeds to his own use and now refuses to account to the plaintiff therefor or to pay to the plaintiff her share

thereof, of which the reasonable value is $500 and for which demand has been made.

The defendant made a general and specific denial of every allegation in the complaint and for a first further and separate answer alleged that until November 24, 1914, he was the sole owner of the land; that prior to that time he and the plaintiff were husband and wife; that on the date mentioned she brought suit for divorce, in which the court rendered a decree in her favor and gave her an undivided one-third interest in the said real estate; that at the time of the decree the plaintiff and the defendant were residing thereon and in possession of the land and that after the divorce the plaintiff left the farm and has never returned. The defendant also avers that between the alleged dates he remained in possession of all the lands, without objection by the plaintiff, and paid taxes thereon. As a second further and separate answer and by way of estoppel the defendant alleges that on April 1, 1916, as plaintiff he commenced a suit in the Circuit Court of Linn County against this plaintiff as defendant therein, for a partition of the lands described in the complaint, alleging that he was the owner of an undivided two-thirds interest; that the plaintiff here owned an undivided one-third interest therein, and that such lands could be divided, and asked the court to appoint referees for that purpose. The plaintiff here appeared in that suit and admitted the allegations of the complaint. Thereafter the court appointed referees to make the partition, and on June 26, 1916, they filed their report, which was confirmed by the court. One third of the land was then set off by decree to the plaintiff Mary Jacobs to be held by her in severalty, and the remaining two thirds to the de-

fendant John Jacobs, to be held by him in the same manner.

The defendant alleges that the Circuit Court had jurisdiction of the parties and of the lands and was entitled to settle all questions of ownership, including that of rents and profits during the period that the lands were owned and held by the plaintiff and the defendant as tenants in common; that at the time of the partition suit and while it was pending Mary Jacobs had knowledge of the rental and made no claim for the amount thereof; that she could and should have set up this matter in her answer to the complaint in the former suit; that all of such questions should have been litigated, tried and determined in the partition suit, and that by reason of her failure and neglect the plaintiff is now estopped to make any claim or prosecute any action for the alleged rents and proceeds.

A demurrer to the defendant's second further and separate answer was sustained. The plaintiff replied and after hearing the testimony the jury returned a verdict in favor of the plaintiff, upon which judgment was entered and from which the defendant appeals, claiming that the court erred in sustaining the demurrer and in rendering a judgment on the verdict:

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Weatherford & Wyatt,* with an oral argument by *Mr. James K. Weatherford.*

For respondent there was a brief over the names of *Mr. W. S. Risley* and *Mr. W. R. Bilyeu,* with an oral argument by *Mr. Risley.*

JOHNS, J.—1, 2. There is no merit in the defendant's contention. A suit for the partition of real property is a statutory proceeding. Section 435, L. O. L., provides:

"When several persons hold real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, or when several persons hold as tenants in common a vested remainder or reversion in any real property, any one or more of them may maintain a suit for the partition of such real property, according to the respective rights of the persons interested therein, and for a sale of such property, or a part of it, if it appears that a partition cannot be had without great prejudice to the owner."

Section 436 specifies that:

"The interest of all persons in the property, whether such persons be known or unknown, shall be set forth in the complaint, specifically and particularly, as far as known to the plaintiff. * * "

Section 440 requires that, "The defendant shall set forth in his answer the nature and extent of his interest in the property." Section 441 is as follows:

"The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried and determined in such suit, and where a defendant fails to answer, or where a sale of the property is necessary, the title shall be ascertained by proof to the satisfaction of the court before the decree for partition or sale is given."

These sections of the Code do not treat of or deal with the question of rents, issues and profits, which are personal property.

As plaintiff in the partition suit the defendant here was the moving party, and the only issue raised by his complaint was the division of the property according to the interests of the respective owners. To that

complaint Mary Jacobs answered, admitting that John Jacobs was the owner of an undivided two-thirds interest in the lands and that she was the owner of an undivided one-third interest. As a matter of fact, the decree was one by consent as to the interest of each party in the land, the partition thereof and the appointment of referees to make the division. There was no allegation in the complaint about any issues or profits or the rent of the land and there was nothing said about those items in the answer. Whatever may have been the province or the duty of the court if such issues had been raised and litigated by John Jacobs in the partition suit, the fact remains that he did not elect to present them, and he has no right to complain because they were not raised by Mary Jacobs in her answer.

3. The primary purpose of the statute is to ascertain and determine the title to real property only, and while it may be true that under proper allegations the question of rental and proceeds would become an incident to a partition suit and could be settled by a decree, in the absence of proper allegations such questions could not be adjudicated.

"Plaintiff may, as an incident to the proceeding for partition, seek and obtain relief in addition to that obtainable in a partition at law and necessary to a complete adjustment of all matters arising out of the cotenancy, such as an accounting for moneys paid for improvements or received by defendants as rents and profits. * * It is sufficient for our present purpose to say that for whatsoever relief plaintiff seeks other than that of the partitioning of the property, he must in his complaint make the allegations necessary to sustain it. If no allegation is made, no relief can be granted, and if an allegation is made, it must fail unless it would be sufficient if it were employed in an in-

dependent action": 30 Cyc. 218, § 11, and authorities there cited.

In 20 R. C. L. 785, the rule is thus laid down:

"It is a well-affirmed principle of law that a judgment or decree in a partition suit, when the court has jurisdiction over the parties and the subject matter, is as conclusive between the parties upon all the material issues in the case which the court was called upon to examine, and which, under the pleadings, were tried and determined, as are judgments in other actions."

And in Volume 15, page 964, of the same text we find:

"If the same evidence would sustain both, the two actions are considered the same, and the judgment in the former is a bar to the subsequent action, although the two actions are different in form. If, however, different proofs would be required to sustain the two actions, a judgment in one is no bar to the other. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties, and it has even been designated as infallible."

The question of rents and profits was not within the pleadings in the partition suit or adjudicated by the decree in that proceeding. The judgment of the Circuit Court is affirmed. AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued April 3, reversed and remanded May 2, 1919.

MULTNOMAH COUNTY *v.* STANDARD AM. DREDGING CO.

(180 Pac. 508.)

Action—Contract or Tort.

1. A complaint *held* to state a cause of action in damages for fraud and deceit, and not one on the theory that the original contract had been deviated from to such an extent that it was not controlling on the parties, and that there was a new contract implied to pay fair or reasonable value of work done.

Contracts—Fraud—Actions for Damages—Affirmance.

2. Where a contractor was prevailed upon through misrepresentation to enter into a contract to render services and furnish material, there was no valid contract until it was ratified with a knowledge of the fraud, and even then affirmance did not effect waiver of claim for damages caused by fraud.

Fraud—Waiver of Right to Damages.

3. Where a contractor entered into a contract by reason of misrepresentations as to the amount of the work, completion of the work after becoming aware of the misrepresentations was not a waiver of the contractor's right to damages by reason of the fraud.

Trial—Nonsuit—Waiver of Variance.

4. Whre a cause was tried and jury was instructed upon a theory not justified by pleadings, defendant was not entitled to a judgment of nonsuit, but only to a trial upon the issues as joined.

[As to right of action in general for false representations, see note in 18 Am. St. Rep. 555.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

This is an action for the recovery of money, in which the complaint, after the formal allegations, proceeds as follows:

"That prior to the month of August, 1916, the said Standard American Dredging Company solicited the said Ray & Company to perform certain work in connection with the grading, concrete and other work forming a part of the approaches hereinbefore referred to and asked the said partnership to submit a bid thereon, and incident to and as a part of said solicita-

tion said Standard American Dredging Company made to the said partnership certain material representations of fact, the principal of which were the following:

"(a) That the concrete work would amount in volume to a minimum of 15,000 yards on which a unit price per yard was to be bid, justifying a low figure because of the great quantity mentioned.

"(b) That several thousand yards of work in connection with grading and sloping could be done by method and means referred to and described as 'jitney,' at a cost of eight cents per yard, and that the said defendant had itself engaged in said variety of work, and that the said figure of eight cents per yard was the result of its own cost ascertained by said experience.

"(c) That no excavation or filling was required between what was designated on the plans as Stations 113 to 117, and Stations 123 to 124.

"(d) That the amount of material to be moved constituted approximately 12,000 yards.

"That plaintiff and other members of the firm of Ray & Company, believing and relying upon the truthfulness of said representations made their offer in connection with the said work and same was accepted and a contract entered into between the said partnership of Ray & Company and the said Standard American Dredging Company providing for the doing of said concrete work at the price of 85 cents per square yard; the rockwork at $2.15 per square yard, and the grading and sloping for the gross price of Two Thousand and Fifty ($2,050) Dollars; and the said partnership thereupon entered upon the performance of said work and the furnishing of material and labor therefor.

"That the said representations of fact and each of them were grossly and fraudulently false and made by said defendant with knowledge of such falsity in order to mislead, defraud and deceive the said partners and each of them and to induce the said partnership to execute said contract, and to offer and agree to perform said work at said prices; that the material respects in which said falsity inhered, all of which were known to the Standard American Dredging Company at the time of making said representations, and none

of which was known to the said partnership were as follows:

"(a) That instead of the concrete work amounting to 15,000 yards, it amounted to only approximately 8,000 yards, with the result that because of the diminution in quantity the cost per yard to said partnership, instead of being slightly below the sum of 85 cents per yard, amounted to $1.15 per yard.

"(b) That the cost of said 'jitney' work was approximately 50 cents per yard, and that the 'jitney' work theretofore done by said defendant and asserted by it to have cost it only 8 cents per yard, actually cost it approximately 48 cents per yard.

"(c) That in truth and in fact instead of the ground between Stations 113 and 117, and Stations 123 and 124, being of the required level and requiring only what is known as shovel work, it was necessary to excavate and remove 3,400 cubic yards of material between said Stations in order to reduce same to the required level.

"(d) That instead of the amount to be moved constituting only 12,000 yards, same constituted approximately 35,000 yards, and that at the time the said defendant made the said representation to the said partnership the said defendant had figures from its own engineers apprising it of the fact that the removal of approximately 24,000 yards was required.

"That plaintiff did not learn any of said facts until after he had assembled his men and equipment and had progressed to a considerable extent with said work and that as plaintiff continued he found said discrepancies greater and greater until they culminated in the figures hereinbefore set forth, and that plaintiff did not learn until the completion of the work that the defendant Standard American Dredging Company made said misrepresentations with knowledge of their falsity and with intent to deceive said plaintiff."

These averments are followed by an allegation that at the special instance and request of defendant Standard American Dredging Company, plaintiff per-

formed work and furnished materials in accordance with an itemized statement there set out, of the reasonable values set opposite the several items, and concludes with a prayer for judgment in the sum of $15,306.56, and costs.

Defendants demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of suit. The demurrer being overruled, an answer was filed, denying all of the allegations of fraud and misrepresentation, and in further and separate answers, plead defendants' contract with Multnomah County, Oregon, and Clarke County, Washington, for construction of the specified work upon the approaches of the interstate bridge, and the execution of the contract with plaintiff for the completion of the work, alleging that they have paid plaintiff all that was due thereon except the sum of $1,354.40, which they admit would be due to plaintiff, but for the fact that plaintiff has neglected to comply with the terms of the contract, by failure to pay certain claims for labor and materials, by reason of which defendants have been unable to collect all that is due them under their contract with the two counties. It is further asserted that all these payments were accepted by plaintiff as payments under the contract, and as being in full for the items to which they apply, and that plaintiff did not, during the performance of the contract make any claim that they were not working under and in pursuance of the contract, or would claim in accordance with the terms of the original contract, which were well known to the plaintiff when the subcontract was executed. There are many other averments, including the statement that plaintiff made a careful investigation of all maps, plans and grounds before undertaking the work, and knew what they would be required to do.

A reply joined issue upon the affirmative answers, and a trial by a jury was had, resulting in a verdict for plaintiff, and defendants appeal.

REVERSED AND REMANDED.

For appellants there was a brief over the names of *Messrs. Langguth & Lyons, Messrs. Carey & Kerr* and *Mr. Charles E. McCulloch*, with oral arguments by *Mr. Arthur Langguth* and *Mr. H. L. Lyons.*

For respondent there was a brief over the names of *Mr. C. H. Libby, Messrs. Crawford & Crawford* and *Messrs. Beach, Simon & Nelson*, with oral arguments by *Mr. Andrew M. Crawford* and *Mr. Roscoe C. Nelson.*

BENSON, J.—1. The essential controversy between the litigants herein arises from their conflicting views as to the nature of the complaint, and the classification of the cause of action. The defendants insist that the initial pleading states a cause of action in damages for fraud and deceit, while the plaintiff just as earnestly contends that his complaint is founded upon the theory discussed, and the doctrine announced by this court, in the cases of *Hayden* v. *City of Astoria*, 74 Or. 525 (145 Pac. 1072); Id., 84 Or. 205 (164 Pac. 729). In the first of these cases, Mr. Justice BEAN quotes with approval from 4 Elliott on Contracts, Section 3697, as follows:

"Sometimes it happens that the original contract has been deviated from in so many matters that it can hardly be regarded as controlling the parties at all, and in such cases the original contract is often treated as abandoned, and a new contract is implied to pay the fair or reasonable value of the work or material. * *

"So, again, in Vermont, 'where the parties under a special contract deviate from the original plan agreed upon, and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contemplated by the parties, it is undoubtedly to be regarded and treated as work wholly extra, out of the scope of the contract, and may be recovered for as such.' "

The opinion then cites several Oregon decisions to the effect that "a subsequent departure from the terms of a written contract by the parties, and mutually acquiesced in abrogates the original contract to that extent." The rules thus enunciated are then expressly applied to the allegations of the complaint in that case. The complaint in that case recited the particulars in which the plans and specifications ultimately adopted varied from those upon which the original contract was based, and showed the particulars in which the changes and deviations required other and greater labor and equipment. We find nothing of that sort in the complaint in the case at bar.

In the first appeal of *Hayden* v. *Astoria*, 74 Or. 525 (145 Pac. 1072), the only question decided by this court was the sufficiency of the complaint, and thereafter upon a trial of the issues made thereon, there was a judgment for the plaintiffs from which the defendant appealed, and, with slight modification, the judgment was affirmed, Mr. Justice MCCAMANT, speaking for the court, saying:

"These findings are too lengthy to be incorporated even in substance in this statement of facts. In the main they were in accord with plaintiffs' contentions and bore out the allegations of the amended complaint. The findings were to the effect that the departures from the contract of August 22, 1911, were so numerous and so substantial as to entitle plaintiffs to recover on a *quantum meruit*."

We find nothing, however, in either of the opinions above mentioned, which would justify a recovery under the complaint in the instant case, upon proof of deviations from the original contract, for nothing of the kind is alleged.

In the present case the trial court adopted the contention of plaintiff, that this case is akin to those of *Hayden* v. *Astoria*, 74 Or. 525 (145 Pac. 1072), Id., 84, Or. 205 (164 Pac. 729), and among others, gave these instructions to the jury:

"The complaint is based upon reasonable value of work, labor and material performed and supplied. The defense is based upon an alleged contract to perform the work and furnish the materials at certain prices. You are hereby instructed that if the original contract has been deviated from in so many matters that it cannot be regarded as controlling, the alleged original contract may be treated as abandoned, and the plaintiff has a right to recover the fair and reasonable value of the work and labor performed, and materials furnished.

"Now, the plaintiff, among other things, alleges fraud. In that connection you are instructed, gentlemen of the jury, that fraud is never presumed. He who alleges it must prove it by clear and convincing evidence. I will state, however, that this action, according to my theory of the case, is not based primarily upon fraud, but is based upon the reasonable value of the services rendered and materials furnished. Fraud, however, is brought in incidentally, and in that connection you are instructed that it must be proved by clear and convincing evidence."

There is not a single allegation in the complaint to justify the theory thus submitted to the jury, and the error involved goes to the substances of the case.

2, 3. In many particulars this case is strikingly similar to that of *Sell* v. *Mississippi River Logging Co.*, 88 Wis. 581 (60 N. W. 1065). The complaint therein

alleged the making of a contract by which plaintiff agreed to drive all of the sawlogs lying in and along the east fork of the Chippewa River, having the defendant's mark thereon, for the sum of $1,000; that defendant's agent represented and guaranteed that the number of such logs (which were then covered by several feet of snow) was, by actual count, 3,700, and no more. It was further alleged that he put the logs into the river, and did not discover, until the drive was nearly completed, that the number of logs so marked was 11,617, requiring an increased crew and additional expense in driving them; that the reasonable value of the labor in driving the logs was $4,000, for which amount judgment was prayed. The court held that while the complaint was far from commendable in form, it stated a cause of action for fraud and deceit, and not upon contract, and continues thus:

"There could be no valid contract until it was ratified with a knowledge of the fraud; and if a party affirms a contract with knowledge of the fraud, he affirms it wholly, but not as a contract made in good faith. He does not thereby waive his claim for the damages caused by the fraud. * * We think that his completion of the drive, under such circumstances, was not an affirmance of the contract nor a waiver of his right to damages by reason of the fraud, and that the contract having been induced by fraud, it is no obstacle to the recovery in this action of his damages, to be measured by what the work was reasonably worth. The complaint states the entire case substantially as made out, and, as the distinctions between forms of action have been abolished, we do not perceive any substantial objection to the allowance of damages on this basis."

4. The views expressed in the above quotation are in full accord with reason and justice, and we adopt them in this case. The cause was tried and the jury

was instructed upon a theory not justified by the pleadings. This would not entitle the defendants to a judgment of nonsuit, as urged by them, but they are entitled to a trial upon the issues as joined. The judgment is therefore reversed and the cause remanded for a new trial. REVERSED AND REMANDED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Argued at Pendleton October 31, 1918, reversed and remanded January 21, rehearing denied May 13, 1919.

IN RE STURTEVANT'S ESTATE.

STURTEVANT *v.* STURTEVANT.

(178 Pac. 192.)

Wills—Probate—Burden of Proof.

1. Where a will probated in common form has been attacked by direct proceedings, proponents must re-probate the will by original proof, as if no probate had been made, the burden of proof being upon proponents.

Wills—Undue Influence—Burden of Proof.

2. The burden of establishing that a will has been executed because of undue influence is upon the party alleging it.

Wills—Mental Capacity—"Delusion."

3. An alleged delusion that an excluded son had buried a large sum of money which he had embezzled from testator was not shown where there was some evidence to support testator's belief, "delusion" being a conception originating spontaneously, without evidence to support it, and one that can be accounted for on no reasonable hypothesis.

Wills—Delusions—Evidence—Sufficiency.

4. Where a will was contested on the ground that testator labored under a delusion that contestant had buried a large sum of money which he had embezzled from testator, evidence *held* not sufficient to show the existence of such delusion.

Wills—Testamentary Capacity—Persons Under Guardianship.

5. A person under guardianship does not on that account lose his right to make testamentary disposition of his estate if he retains sufficient mental capacity to execute a will.

Evidence—Testamentary Capacity.

6. Under Section 727, L. O. L., witnesses who were intimate acquaintances of testator may express their opinion as to his sanity and give reasons therefor, but they cannot decide whether or not he had capacity to make the will, as that would invade the province of the court.

Wills—Contests—Evidence—Relevancy.

7. Where a will is contested on the ground of want of capacity, contestant alleging that testator labored under a delusion that his money had been embezzled by a son, evidence as to the reputation for honesty of such son was irrelevant.

Wills—Testamentary Capacity—Evidence—Sufficiency.

8. Where a will is contested on the ground of want of capacity and undue influence, positive testimony of the subscribing witnesses, showing a testamentary capacity, overcomes opinion evidence by other witnesses, showing eccentricities of actions, writings, and speech.

Wills—Mental Capacity—Evidence—Sufficiency.

9. Where a will was contested on the ground of mental incapacity, evidence *held* to show that testator, although he was old and infirm and not so bright as formerly, retained sufficient mentality to make his will.

Wills—Contests—Undue Influence—Evidence.

10. In a suit by testator's son to set aside a will which failed to make provision for him, and made another son the chief beneficiary, evidence *held* not to sustain a finding of undue influence.

ON PETITION FOR REHEARING.

Wills—Testamentary Capacity.

11. One has sufficient testamentary capacity to make a will if he knows what he is doing and to whom he is giving his property, though he may be incapable of making a contract or managing his estate.

Wills—Testamentary Capacity—Delusions.

12. The mere fact that testator had delusions upon some subject does not show want of testamentary capacity, if these delusions did not affect his mind in making his bequests.

Wills—Testamentary Capacity—"Delusion."

13. A "delusion" is a fixed belief in a proposition which has no foundation in evidence and which is so extravagant that a reasonable man would not adhere to it.

Trial—Setting Aside Verdict—Evidence.

14. A verdict must stand if there is any evidence to sustain it.

Wills—Validity.

15. Testator has perfect legal right to dispose of his estate as he chooses.

Wills—"Undue Influence."

16. Kind treatment and even reasonable solicitation do not constitute "undue influence."

Wills—Testamentary Capacity—Old Age—Mental Impairment.

17. One who retains sufficient independent mentality to know what he wishes to do with his property and to know that will expresses his desires may make will, though suffering from mental impairment as result of old age and disease.

[As to presumption and burden of proof in case of a disputed will, see note in 31 **Am. St. Rep.** 680.]

From Umatilla: Dalton Biggs, Judge.

Department 1.

On July 18, 1914, the County Court of Umatilla County took proof of a will of A. J. Sturtevant of date November 5, 1913, in common form, and admitted it to probate, appointing an executor and taking and approving his bond. On September 16th following, two of the decedent's grandchildren, to whom his deceased son was father, appeared in the County Court by their mother and guardian, Myrtle F. Carnes, to contest the validity of the will thus proved. After alleging their relationship and that of other persons named in the will to the decedent, under their first cause of contest the contestants allege:

"That said Andrew J. Sturtevant at the date of his death was of the age of about 83 years, and that at the time of the execution of said pretended will and for long prior thereto and until his death he was not of sound or disposing mind or memory, and that in consequence of illness, both physical and mental, and in consequence of old age, and in consequence of paralysis long continued, and other causes, his brain was diseased, his mind was seriously impaired, and his memory substantially destroyed, and that at the date of said will and for a long time prior thereto and thereafter up to the time of his death, the said Andrew J. Sturtevant was incapable of exercising any judgment over his property, or any other matter of im-

portance, and was at the date of said will and long prior thereto, and up to the time of his death incapable of making a valid will.

"That these contestants are by the terms of said pretended will cut off with only $2.50 each, and are thus defrauded of their patrimony, and that respondents are the beneficiaries thereby and thereunder."

Their second charge reads thus:

"That at the date of said alleged will and for a long time prior thereto, and thereafter up to the time of his death, the mental condition of said Andrew J. Sturtevant was such that he was easily persuaded in his course of conduct, and that said will was fraudulently obtained by undue influence exercised upon and over the said Andrew J. Sturtevant by respondent Mark A. Sturtevant and Alma Sturtevant, and perhaps other parties acting for them and in their interest, and that said will was not and is not in truth or in fact the will of said Andrew J. Sturtevant.

"That said pretended will was drawn from a memorandum in writing furnished to said Andrew J. Sturtevant by other persons to these contestants unknown, and that said Andrew J. Sturtevant did not understand when said pretended will was executed that he was making a last will and testament, and that his mind was then and there so feeble and so unsound that he had no ability to distinguish between a last will and testament and a petition for the removal of a guardian."

It is also averred in the third place that:

"Andrew J. Sturtevant at the time of the execution of said pretended will and for a long time prior thereto, and thereafter up to the date of his death, was a person adjudged by the courts of the State of Oregon to be incapable of conducting his own business, and was under guardianship, and that in truth and in fact said Andrew J. Sturtevant at the date of the execution of said alleged will and for a long time prior thereto, and thereafter until the time of his death, was to all intents and purposes an insane person and in-

capable of transacting any business of importance, and incapable of executing a last will and testament, and that said pretended will was not the product of his own free agency."

Lastly they said:

"That at the time of the execution of said alleged will and for a long time prior thereto, and thereafter up to the time of his death, said Andrew J. Sturtevant was possessed of and influenced by a delusion, which delusion colored, moulded and affected all his actions, his attitude and his sentiment toward these contestants, his grandchildren; that said delusion was a belief which he entertained that the father and mother of these contestants had a large amount of money belonging to him, the said Andrew J. Sturtevant, buried, and that the father of these children in his lifetime, and the mother of these children thereafter, was withholding from him, the said Andrew J. Sturtevant, a large amount of money belonging to him, and that said delusion caused these contestants, his grandchildren, to be substantially cut off from all benefits under said pretended will."

The matter in the contesting petition was traversed by Mark A. Sturtevant, the principal beneficiary, and by his wife and daughter Faye, who also took under the contested will.

Further answering the contestants' petition, the parties named made appropriate averments showing the establishment and probate of the will in question and alleged that it was the last will and testament of A. J. Sturtevant, deceased. The new matter in the answer was controverted by the reply. The County Court heard the testimony on the issues thus framed and set aside the will. Identical action was taken by the Circuit Court on appeal and the proponents have appealed to this court. REVERSED AND REMANDED.

For proponents-appellants there was a brief and an oral argument by *Mr. James A. Fee.*

For contestant-respondents there was a brief over the names of *Mr. Stephen A. Lowell, Mr. W. M. Peterson, Messrs. Raley & Raley, Mr. C. M. White* and *Mr. Frederick Steiwer,* with oral arguments by *Mr. Lowell, Mr. James H. Raley, Mr. Peterson* and *Mr. White.*

BURNETT, J.—It appears that A. J. Sturtevant, the deceased, was a merchant and land owner at Pilot Rock in Umatilla County. By close attention to business through a series of years he had accumulated a fortune in excess of $40,000. He died on July 3, 1914. On September 27, 1910, on petition of his son, Mark Sturtevant, the County Court of Umatilla County made the following order:

"Now on this day the duly verified petition of Mark Sturtevant and L. E. Roy, praying for the appointment of a guardian of the person and estate of A. J. Sturtevant, coming on to be heard; and it appearing to the court that the said A. J. Sturtevant is personally present in court together with his attorney, Will M. Peterson, an attorney at law of this court, and that the said A. J. Sturtevant has this day filed an answer to the said petition with the clerk of this court in which he admits that there should be a guardian forthwith appointed to look after his person and estate, and suggesting that T. J. Tweedy, a resident of Pendleton, Umatilla County, Oregon, and an old acquaintance and friend, be appointed; and the court having fully considered the said petition and the answer thereto, and having personally talked with the said A. J. Sturtevant and fully realizing the situation relative to his condition of mind and body, and the large estate which he owns, and being fully satisfied after a full hearing and consideration of all matters appertaining to the application for the appointment of a guardian, and being satisfied that a guardian of his

person and estate should be forthwith appointed by this court.

"It is now therefore considered, ordered, adjudged and decreed that A. J. Sturtevant is a person incapable of conducting his own affairs, and of properly caring for his health and general welfare; that a guardian of his person and estate should be forthwith appointed by this court; that T. J. Tweedy, a competent and qualified person, be, and he is hereby, appointed guardian of the person and estate of A. J. Sturtevant, and letters of guardianship shall issue out of this court to him as such upon his filing with the clerk of this court a bond with surety, first approved by this court, in the sum of Five Thousand ($5,000.00) Dollars, conditioned as by law required."

At the time of his death the decedent was approximately eighty years of age. His wife died in 1910 prior to the appointment of his guardian. The aged couple had two sons, one of whom, Clark Sturtevant, died in 1906, leaving a widow who three years afterwards married Owen Carnes. The deceased son also left two children, contestants here, Vivian Sturtevant, who died during the pendency of this proceeding, and a son, Lowell Sturtevant. The testator likewise had another son, Mark Sturtevant, the principal beneficiary in the contested will. By a former wife Mark had two sons, Clark and Andrew Sturtevant, and two daughters, Faye and Carrie Esther, each of the daughters being a beneficiary.

Mark Sturtevant married Alma, his present wife, in October, 1910. She was adjudged insane on January 30, 1915, and was not present at the hearing below.

Condensed to its lowest terms, the attack on the will in question is twofold: (1) That by reason of insanity the testator was incapable of making a valid will; and, (2) that the disposition of his property embodied in the instrument in question was brought about by

undue influence exercised over him by Mark Sturtevant and wife, and others acting in their interest. It is true, something is said about the testator's having been controlled by a delusion, but that is properly classified under the charge of insanity or want of testamentary capacity.

1. From the early case of *Hubbard* v. *Hubbard,* 7 Or. 42, to the present time the rule has been that where a will has been probated in common form and its validity has been attacked by direct proceedings, it lies upon the person propounding the will to re-probate the same by original proof in the same manner as if no probate thereof had been had, except as to such matters as are admitted by the pleadings, and in such a proceeding the *onus probandi* to show testamentary capacity of the decedent and formal execution of the instrument is upon the party propounding the will. Among the latest expressions on this subject comes one from the pen of Mr. Chief Justice MCBRIDE in *King* v. *Tonsing,* 87 Or. 236 (170 Pac. 319), in these words:

"The burden of proof was upon the proponent to establish the testamentary capacity of the deceased by the preponderance of testimony."

In a sense, a jarring note in the harmony of our decisions on this subject is found in some language used in *In re Will of Susanna Dunn,* 88 Or. 416 (171 Pac. 1173), where it is said:

"The contestants have not established by a preponderance of the evidence that the testator was mentally incompetent or that any undue influence was used to bring about the execution of the will in controversy."

As shown in *Simpson* v. *Durbin,* 68 Or. 518 (136 Pac. 347), the burden of establishing the allegation that the contested will was the product of undue influence is

upon the contestants. For this last proposition the language in the Dunn case is an authority, but it must be disregarded on the question about the burden of proof concerning testamentary capacity. In the Dunn case the principal attack was based upon undue influence and the inclusion of testamentary capacity in the opinion must be set down as a slip of the pen. The authorities on the subject of testamentary capacity are collated in *Deckenbach* v. *Deckenbach*, 65 Or. 160 (130 Pac. 729), and *Wade* v. *Northup*, 70 Or. 569 (140 Pac. 451).

The reason underlying the rule as to the burden of proof respecting testamentary capacity and undue influence may be thus stated: If there is no will in existence, the property of a testator is distributed according to the statute of descents. If anyone would interrupt this course of distribution he must show not only a properly executed will but that there was a testator competent to publish such a document. The persons naturally interested in the estate under the statute of descents have not had their day in court where the will has been admitted to probate in common form. Consequently, the burden of making a different disposition of the property lies upon him who propounds the will to show that the testator had testamentary capacity and that the instrument in question was executed in due form of law. On principle, the question is different where the effort is to overturn the will on the allegation that it is the product of undue influence. This is a species of fraud by the exercise of which the nominal testator is supposed to have been deluded into making a disposition of property which is not the product of his own mind.

2. It is hornbook law that he who alleges fraud must prove it, so that in good reason, as stated in *Simpson*

v. *Durbin*, 68 Or. 518 (136 Pac. 347), the burden of establishing undue influence lies upon those alleging it.

As to the delusion mentioned in the contestants' petition, the circumstances appearing in evidence are substantially these: For about nine years prior to his death Clark Sturtevant, son of the testator, had managed the business of his father at Pilot Rock, having practically entire charge thereof. Under the son's management the business had not prospered as it had under the direction of the father. Prior to her death the wife of the testator told him that Clark had loaned some money to a cattle concern in the neighborhood. At his death the books showed an indebtedness of the son for goods he had used in his living. Still further, when an effort was made after Clark's death to collect the accounts standing on the books, many debtors came forward and claimed that they had made payments to Clark in his lifetime, with which they had not been credited. The evidence shows that while the testator tolerated the wife of his son Clark, he did not like her. His aversion for her was increased by the fact that after the death of her husband she claimed from the father wages which she asserted were due to her husband from the father for the management of the business, and caused the administrator of the son's estate to commence an action at law against the father to recover $7,000 as wages of her deceased husband. The father retorted with a cross-bill in equity, demanding an accounting of the son's stewardship during the period the latter managed the business at Pilot Rock. About this time, also, at the instance of their mother, the minor children of Clark Sturtevant instituted a suit against A. J. Sturtevant and his guardian to compel the conveyance to them of certain real property at Pilot Rock

standing in the ward's name, which they claimed should have been conveyed to their father. Meanwhile the guardian had been appointed for the testator and he settled the suits by payment to the estate of Clark Sturtevant of the sum of $1,000 and the execution of a deed to the minor children of Clark Sturtevant for the lots at Pilot Rock. One of the terms of the stipulation winding up the three suits was that the right of the two children to inherit property from their grandfather or his deceased wife should not be settled, compromised or affected by the adjustment of the litigation.

There is some evidence that the testator made some inquiry as to whether any money was buried by his deceased son and that at various times he claimed that the son had taken his money during the management of the business; but with respect to the minor children, his statement to the attorney who drew the will in question was to the effect that he thought by receiving the money and the real property in the settlement of the litigation they had received enough from his estate and hence he chose to allow them only the nominal sum of $2.50 each. Having before him the facts that his previously prospering business declined under the management of his son, that the latter's own books showed him indebted to his father, that the various debtors came forward with well-substantiated claims that they had paid money to the deceased son for which they had not received credit, and the statement made to him by his wife that the son had loaned money to the cattle concern, the testator had data upon which to found his assertion that the son had embezzled his money.

3. He may have rendered too harsh a judgment upon the deceased son, but it was not because of a delusion,

for there was some evidence to sustain it. Delusions are defined in *Potter* v. *Jones,* 20 Or. 239 (25 Pac. 769, 12 L. R. A. 161), to be:

"Conceptions that originate spontaneously in the mind without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis. The mind that is so disordered imagines something to exist or imputes the existence of an offense which no rational person would believe to exist or to have been committed, without some kind of evidence to support it."

On this branch of the case it is not for us to say whether in fact the son embezzled the money, but we must say from the record that there is evidence sufficient on that subject, which, presented to the mind of his father, would be a basis upon which the latter could render a judgment—without having a delusion imputed to him—although his decision might in our estimation be a harsh one.

4. On the record before us we are compelled to say under the authorities that there was no delusion proved as alleged in the contestants' petition: *Stevens* v. *Myers,* 62 Or. 372 (121 Pac. 434, 126 Pac. 29), and authorities there cited.

Respecting the appointment of the guardian for the decedent, it is said in *Ames' Will,* 40 Or. 495 (67 Pac. 737):

"The appointment of a guardian for a person alleged to be *non compos mentis,* by a court having jurisdiction, must necessarily create a presumption of the mental infirmity of the ward; but such decree does not conclusively show that the testamentary capacity of the person under guardianship is entirely destroyed, and the presumption thus created may be overcome by evidence proving that such person at the time he executed a will was in fact of sound and disposing mind and memory."

In later authorities, such as *In re Sneddon*, 76 Or. 470 (149 Pac. 527), and *In re Northcutt*, 81 Or. 646 (148 Pac. 1133, 160 Pac. 801), a distinction is made between an insane person and one incapable of conducting his own affairs.

5. In any event, a person under guardianship does not on that account lose his right to make testamentary disposition of his estate, if he retains sufficient mental capacity to execute a will.

On the main question of the testamentary capacity of the testator, as stated in the Ames case:

"The rule is settled in this state that if a testator at the time he executes his will understands the business in which he is engaged and has a knowledge of his property and how he wishes to dispose of it among those entitled to his bounty, he possesses sufficient testamentary capacity, notwithstanding his old age, sickness, debility of body or extreme distress" (Citing authorities.)

This is the established standard in Oregon and has been followed without variance from *Hubbard* v. *Hubbard*, 7 Or. 42, until the present time. For instance, in *Rothrock* v. *Rothrock*, 22 Or. 551 (30 Pac. 453), the testator was so paralyzed as to be speechless and made his wishes known respecting the disposition of his property by nodding his head in answer to questions propounded by the scrivener. In *Clark* v. *Ellis*, 9 Or. 128, the characteristics of the testator were very largely like those detailed in the evidence about the author of the will here in question. There the testator was suffering from incurable disease, talked foolishly and was possessed of the notion that his partner had fixed a trap in his bath to suffocate him and that he was trying to get rid of him; all without foundation. He frequently wept and at times gave strong indications of insanity. Yet the court sustained his will on

the testimony of the subscribing witnesses who deposed that at the time he made the will he was rational and knew what he was about.

Many witnesses for the contestants here narrated certain eccentricities of conduct of the testator and of his habits of uncleanliness resulting from his inability to control the discharges of the intestines and bladder, and his apparent unconsciousness of the same; and many of his letters were introduced, written during the period from prior to his guardian's appointment up to about the time the will in question was executed. These writings, especially during the year 1911, show incoherencies and repetitions of words and phrases. Reading the entire correspondence, however, shows that towards the latter part of the period his writing improved in coherency. It is shown also that he made many wills, writing some of them himself. Indeed, there are in evidence four of his wills, regularly executed so far as form is concerned, dated respectively July 19, 1907, January 19, 1911, February 7, 1911, and December 29, 1911. All but the first of this quartette of wills were made in the same year and while the witnesses for the contestants all give their opinion that he was insane and incapable of making a will, the contestants, however, rely upon the will of December 29, 1911, and propounded it for probate soon after the old man's death, and it was probated in common form. Under these circumstances the contest is really between the two wills, the one of December 29, 1911, and that of November 5, 1913.

Respecting the sanity of an individual, Section 727, L. O. L., reads thus:

"In conformity with the preceding provisions, evidence may be given on the trial of the following facts:— * *

"10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer, and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given. * * "

Many witnesses were called for the contestants who gave instances of the testator's eccentric conduct, such as not recognizing old acquaintances, his failure to find his boarding place in the town of Pendleton and of inquiring how to get to various law offices with which he ought to have been familiar from previous acquaintance in the town, and with practical uniformity those testifying were asked their opinion as to whether he was capable of making a will. That is the ultimate question to be determined in the case, and propounding such interrogatories is on a par with calling upon witnesses in a criminal case to give their opinion as to the guilt of the defendant. It is for the court to determine whether the testator was capable of making a will. The decisions are not entirely harmonious on this subject, but in the note to *Atwood* v. *Atwood,* 37 L. R. A. (N. S.) 591, the authorities are assembled showing that the weight of precedent is to the effect that in the contest of a will opinion evidence as to the capacity of the testator to make a will is incompetent. The principal case is reported also in 84 Conn. 169 (79 Atl. 59). See, also, *Brown* v. *Mitchell,* 88 Tex. 350 (31 S. W. 621, 36 L. R. A. 64, and note).

6. Under the Code mentioned, if the witnesses were intimate acquaintances of the testator they had a right to express their opinion as to his sanity and give their reasons for it, but when they undertook to decide against his capacity to make a will they invaded the province of the court.

As frequently is the case in such litigation, the trial was permitted to extend over a very wide range of in-

vestigation, much of it entirely irrelevant, and we regret to state that the proceedings were clouded with a considerable degree of rancor which makes the investigation of the issues all the more difficult. The two questions to be determined are simply whether the testator had testamentary capacity at the time he executed the will in question, and, granting that it was executed, whether it was the product of undue influence exerted upon him by Mark Sturtevant or his wife, or persons operating in their interest. Incidentally, the alleged delusion about the defalcation of his deceased son is to be considered in connection with his testamentary capacity.

7. The honesty of the son is not directly in issue. Hence, evidence offered by the contestants to the effect that Clark Sturtevant bore a good reputation for honesty and integrity was irrelevant and should have been excluded under the authority of *Ladd* v. *Sears*, 9 Or. 244. In that case the plaintiffs accused the defendant of overdrawing his account in their bank to the extent of $500, and it was alleged that he did this by means of imposition and fraud. The court there said:

"The offer by defendant to introduce evidence of his general good character for honesty and integrity was properly overruled. While the complaint charged him with imposition and fraud in obtaining the sum of money in controversy, such claims were not essential to plaintiffs' cause of action and need not have been either alleged or proved. The gist of the action was money had and received, and the right of plaintiffs to recover, and the amount of recovery in no wise depended upon the proof of any fraud or evil motive on the part of the defendant, in any part of the transaction."

In respect to the delusion mentioned, the legitimate scope of the inquiry is to ascertain whether there was any evidence whatever upon which the testator

could found his judgment, however just or unjust, in regard to the fraud of his son. The court was not called upon to adjudicate in the present litigation any of the rights of the father or of the son in their relations to each other.

In support of the will we have the testimony of the attorney who drew it, to the effect that in obedience to a message sent to him by the testator from Pilot Rock, he went there from Pendleton and together he and the testator walked out into the orchard and the old man told him how he wanted the will drawn. Not being prepared to write it there, it was arranged that the attorney should return to Pendleton and that Sturtevant should call there within a few days, when the writing should be done and the instrument executed. In conformity with this agreement, the old man appeared in the attorney's office alone on November 4, 1913. At that time he had a written memorandum in his own handwriting in the shape of notes on the subject of his will, and, as the attorney states, Sturtevant then and there dictated to him the terms of the will, paragraph by paragraph. As soon as each paragraph was written it was read over to the testator, who approved it, and then they took up the next paragraph, which the old man also dictated, and so on through the will. Speaking of his grandchildren, the contestants, he gave as a reason for allowing them only a nominal sum apiece that they never came near him and that they had procured judgment against him for $1,000 and the real property at Pilot Rock already mentioned, and he thought that was enough for them. In support of the clause making Mark Sturtevant the residuary legatee he said that Mark had been treating him better lately and he thought he ought to have the property. There was no witness conveniently at hand

at the time, and so the actual signing of the document was postponed until the next day, when the testator again appeared at the office of the attorney, who called in a physician whose office was in the same building. It was known to all parties that the deceased was then under guardianship, so as a precautionary measure the physician, as he describes in his testimony, thoroughly examined Sturtevant as to his sanity, occupying almost an hour in the process, and the will was again read over to him, paragraph by paragraph, and he expressed his approval of the same. The will was then executed in due form, the attorney and the physician subscribing their names as witnesses. Both of them say that he was of sound mind at the time. This they were authorized to do under the section of the statute above noted, because they were subscribing witnesses to the document. The substance of their testimony is that the old man knew what he was about. This was supported by the fact that he was in the habit of making wills, and in the explanation of that conduct one witness says that when taxed with changing his mind so often he said in substance, "Things change, and I have a right to change my will." He certainly knew what he was doing. Without prompting, he spoke of the objects of his bounty. He made provision for the support of the two daughters of Mark Sturtevant and also for the benefit of Mark's wife. He remembered and provided nominally for the remaining grandchildren, who would have a claim upon his estate if he died intestate, and gave at least a plausible reason for his small bequest to them. The attorney says that he furnished the description for the real property mentioned in the will, showing that he had knowledge of his estate. No question is made but that he owned that property. Hence, we have all the elements established which

enter into the standard rule laid down in *Ames' Will,* 40 Or. 495 (67 Pac. 737).

8. The will must speak from and as of the time it was executed. When we come to weigh the testimony, on the one hand, we have the actual, positive, unqualified testimony of the subscribing witnesses, delineating all the elements of testamentary capacity according to the standard established by the Oregon decisions. On the other, we have the opinions of many other witnesses, both lay and professional, based upon eccentricities of action, writing and speech. In *Pickett's Will,* 49 Or. 127, 153 (89 Pac. 377, 386), the testator was sixty-eight years old, blind, and in gradually failing health from a progressive hardening of the arteries, which resulted in his physical prostration, owing to inability to control any of his muscles, and a gradual failure of mind followed by death from want of arterial blood. In these respects the case of Pickett is closely paralleled by that of Sturtevant. There, as here, there were opinions *pro* and *con* respecting his mental capacity, and the matter is thus epitomized:

"At the utmost, this is but opinion evidence, which may or may not be correct, but it cannot be permitted to overcome the unqualified statements of an unimpeached witness of the existence of the very fact that the opinion says is impossible."

The testator in *Clark* v. *Ellis,* 9 Or. 128, was very similar to the testator in the instant case and in summing up, Mr. Chief Justice Lord used this appropriate language:

"The point of time, then, to be considered at which the capacity of the testator is to be tested, is the time when the will was executed. This is the important epoch, and Judge Washington says: 'The evidence of the attesting witnesses, and next to them of those who

were present at the execution, all other things being equal, are most to be relied upon.' In the case before us, none other than the attesting witnesses were present at the execution, and they have testified to the soundness of his mind at that time. The evidence of the attorney who drew the will according to his instructions, and the positive and uncontradicted testimony of the subscribing witnesses to the will, of the soundness of the testator's mind at the time the will was executed, establish beyond doubt that the testator was rational, and did know and understand what he was doing at the time the will was executed."

It would seem that this language of the learned Chief Justice LORD is decisive of the present contention.

In *Wendl* v. *Fuerst,* 68 Or. 283, 293 (136 Pac. 1), the court, speaking by Mr. Justice RAMSEY, had occasion to contrast opinion evidence with that of witnesses who spoke directly to the question at issue, and the following excerpt from 5 Encyclopedia of Evidence, page 463, is quoted with approval:

"Generally the testimony of an expert will not be allowed to overthrow positive and direct evidence of credible witnesses, who testify from their personal knowledge."

As between the direct testimony of the subscribing witnesses and the statements of the other deponents to the effect that in their opinion the deceased was not competent to make a will, we have the opinion that the testator could not do such a thing, and on the other hand we have the positive statement that the testator did actually do the thing the others thought he could not do, and that, too, in a manner meeting all the elements and subserving all the conditions laid down as components of testamentary capacity. The case of the proponents, however, is well supported by testimony of old friends and acquaintances of the deceased, both

lay and professional, to the effect that while the old man was weakened by age, he retained a knowledge of his property and business and of his children and grandchildren, and knew what he was about in respect to his estate.

Dr. C. J. Smith, who resided for many years at Pendleton, was well acquainted with the testator during all that period and subscribed as a witness some of the wills mentioned, describes the old man thus:

"He was considered quite a strong man mentally and he had very strong convictions of his own and willing to express himself frequently."

Speaking further, of the effect of a stroke of paralysis, he said:

"I don't think it impaired his mental faculties so much, except, however, he was partially paralyzed at that time, and naturally left one side weak and he always used a cane, but he continued to transact his business for a number of years. Although physically weakened, nobody questioned his mind under the circumstances. * * He was rather cutting with his tongue, and witty. He could say very cutting things at times."

The essence of Dr. Smith's testimony may be expressed in his statement as follows:

"I have never believed Mr. Sturtevant to be insane. As I said before, I have always known him since I first became acquainted with him in '92 to be an eccentric character, and as he became older, more so."

Other physicians, testifying for the contestants, gave their opinion that he was incapable of making a will, but the effect of their testimony is considerably weakened by the fact that after the guardian was appointed, Sturtevant was brought before the County Court of Umatilla County on the charge that he was insane, with a view to committing him to the insane

hospital, and some of these same physicians, having examined him at the hearing, pronounced him sane, so that he was discharged. One of them, speaking of this proceeding, said in substance that he stood a fine mental examination. But he qualifies his course there by saying that he then entertained some doubt as to Sturtevant's sanity, but pronounced him legally sane on the ground that the state hospital was then taxed to its capacity for patients.

It is charged in substance by the contestants that the old man was unable to tell whether he was making a will or instituting a proceeding to remove his guardian. The undisputed fact is that the guardian had custody of the will of December 29, 1911, and refused to surrender it to the testator. The latter was displeased with his guardian because he suffered judgment to be entered against him for the $1,000 mentioned and for the conveyance of the property in the settlement of the litigation with his deceased son's children and their mother. It is charged also that he expressed his dissatisfaction with his guardian's keeping him at Pendleton at an expense of $50 per month, when he could have kept him at Pilot Rock, amid home surroundings, for less money, and he complained of various expenses to which his estate was subjected under the control of the guardian. It is not a question of the honesty or integrity of his custodian; that is not here at issue and it may be said in passing that at best, speaking most strongly against him, all that can be said from the record is that men would differ as to the wisdom of his judgment in his management of his ward's affairs. There is nothing to impeach his honor or probity; but looking at it from the old man's viewpoint, affected as he was by hostility towards the widow of his son on account of her

having caused the action against him for $7,000 and demanding a deed for the real property, we cannot say that he did not have reason to be displeased with the administration of his guardian. The testimony shows that, having been unable to get the guardian to give up the will of December 29, 1911, he sought the advice of the attorney who drew the will, about how he could defeat that testament which made his guardian the trustee of his estate, and the attorney explained to him, as the evidence shows, that the will could be disposed of by making a later one with different provisions respecting the custody of his estate. There is no testimony tending to show that he thought he was engaged in a proceeding to remove the guardian. On the contrary, it is manifest that he knew he was making a will, and nothing else.

9. We conclude upon this branch of the case, from a careful examination and study of the whole testimony, that while by reason of old age and infirmity, A. J. Sturtevant was not so bright mentally as he had been in his prime, yet he retained sufficient mentality to enable him to know the nature of the transaction in which he was engaged while making his will; that he was then arranging a final disposition of his property to take effect after his death; that he had a comprehension of his property and knew and remembered all those who would have any claim upon his estate under the statute of descents, in case he died intestate.

It remains to consider the charge that the will was the product of undue influence. The only direct testimony in favor of the contestants on this point is that given by Faye Sturtevant, the daughter of Mark Sturtevant. She was evidently simple-minded and appeared to be incensed at her father because he had taken steps to prevent her marriage. Some of her testimony is quoted:

"Q. What did Mark say to him about what he should do with his property, if anything?

"A. He said he should leave it to him; he thought he had deserved it, he had worked on the place and he thought he ought to have it, he had taken care of him and he thought the others were trying to get it away from him with robbing him. * *

"Q. What did Alma tell your grandfather, if anything, about what he should do with his property?

"A. She said something about the same, she said the rest of them were working for it and trying to get it away from him."

On the contrary, Mark Sturtevant flatly denies that he undertook to influence his father in any manner in the disposition of his property. On cross-examination, when pressed by the attorneys for the contestants, he testified thus:

"Q. After you got back there you and your wife were pretty careful not to have any trouble with the old gentleman, weren't you?

"A. No, sir. I was not any more careful than before and I don't know as she was.

"Q. You were not trying to be good to the old man so he would think you were pretty good children and leave his estate to you, or anything of the kind?

"A. No, sir. I know if I asked him to make me a will he would turn and act the other way. I knew him better than you did. If you wanted to bulldoze him into doing anything you would get nothing, you had to let him have his own way.

"Q. That is what you and your wife did while up there the last time, wasn't it, and you let him go his own way?

"A. No, sir. He done as he pleased. I never asked him to make a will."

Remembering that under the authority of *Simpson* v. *Durbin*, 68 Or. 518 (136 Pac. 347), the burden is upon the contestants to prove the undue influence, we

here set down an excerpt from the opinion by Judge SANBORN in *Sawyer* v. *White,* 122 Fed. 223 (58 C. C. A. 587):

"There is no doubt that he was influenced to do so by his affection for and confidence in his son, and by his gratitude to him for his years of devotion and service. But hatred or indifference is not indispensable to the validity of a gift, nor is gratitude or affection for the grantee fatal to it. * * The natural influence of the affection of a parent for a child is neither fraudulent nor illegal. * * Nor is the fact that the grantee or devisee occupies a fiduciary relation to his grantor or testator necessarily fatal to the gift. It is the use of that relation to secure a deed or devise against the free will or desire of the grantor or donor, and not the mere existence of the relation, that vitiates a grant. It is true that when an unnatural or unreasonable gift or devise is made—such as one by a ward to his guardian, or by a helpless invalid to his nurse, or by a client to his trusted attorney—the presumption at once arises that the fiduciary relation was used to overcome the will of the grantor, and that the deed or devise is voidable. But when the natural gift of a parent to a loved and trusted child is in question, this presumption is met and overcome by the still stronger presumption that such a gift is the natural and reasonable act of the parent, and that the free will of the donor inspired the grant, uninfluenced by the trust relation."

The doctrine is set forth in similar terms in *In re Will of Hiram* v. *Allred,* 170 N. C. 153, 158 (86 S. E. 1047, 1049, Ann. Cas. 1916D, 788, L. R. A. 1916C, 946, 949), quoting with approval from the opinion of Mr. Justice MCCLELLAN in *Bancroft* v. *Otis,* 91 Ala. 279 (8 South. 286, 24 Am. St. Rep. 908):

"With respect to testamentary dispositions, the primary presumption upon which the whole superstructure of the doctrine of presumed undue influence in contracts and gifts ***inter vivos*** rests is entirely lacking.

They take effect upon the death of the donor. They involve no deprivation of use and enjoyment. There can be, with respect to them, no assumption that the donor would not voluntarily part with his property, since, in the nature of things, it must then pass from him to others selected by himself according to the dictates of his affections, or appointed by the law of descents and distributions, and in either case without consideration moving to him. It is not out of the usual course of things, but in accordance with the exigencies of mortality, that the property should cease to be his, and should become that of another. And the very considerations which lead to suspicion, which must be removed in transactions *inter vivos*—friendship, trust and confidence, affection, personal obligation—may, and generally do, justly and properly, give direction to testamentary dispositions."

The situation confronting the old man in November, 1913, may be thus described: He was not without cause to be grieved at the management of his business by his deceased son. The children of that son ignored him and paid him no attention. Actuated by their mother, whom he did not like, they sued him for $7,000 and for some real property. His guardian offended him by settling the litigation in a manner, according to the old man's estimate, disadvantageous to him. Naturally an estrangement arose between him and Clark Sturtevant's children. He grouped them with their mother, who controlled them, and from his viewpoint he had cause to ignore them in the final disposition of his property. He gave a plausible reason for his action. Displeased with his guardian, he sought to deprive him of the *post-mortem* management of his property as trustee thereof; all of which he could accomplish by making a subsequent will. His only surviving child was Mark Sturtevant and it was normally to be expected under the circumstances that he should

give this son the preference in the distribution of his worldly effects. He gave as a reason therefor that Mark had been better to him lately and, as pointed out in the precedents last above quoted, the influence of such conduct, nay, even a request that the property be left to him, would not amount to undue influence. At least, on the whole case the scale predonderates against the contestants on that issue. The property was that of the testator. When the will was drawn none of the contestants or proponents had any interest whatever therein. It was his to do with as he chose. The right to make testamentary disposition of it is a rule of property not to be disturbed except for clear and cogent reasons. We are not concerned with what we, from our standpoint, might consider to be the justice of the distribution. As said by Mr. Chief Justice McBride in *Beakey* v. *Knutson*, 90 Or. 574 (177 Pac. 955):

"It may be said the will is unjust, * * but, perhaps unfortunately, the law does not avoid a will because it fails to square itself with what persons other than the testator deem to be justice."

And it was set down in *Ames' Will*, 40 Or. 495 (67 Pac. 737):

"When a will has been properly executed, it is the duty of the courts to uphold it, if the testator possessed a sound and disposing mind and memory, and was free from restraint and not acting under undue influence, notwithstanding sympathy for persons legally entitled to the testator's bounty and a sense of innate justice might suggest a different testamentary disposition."

Further, as said in *Van Alst* v. *Hunter*, 5 Johns. Ch. 148, 160:

"It is one of the painful consequences of extreme old age that it ceased to excite interest, and is apt to be left solitary and neglected. The control which the

law still gives to a man over the disposal of his property, is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent arts, but contains those very dispositions, which the circumstances of his situation, and the course of the natural affections, dictated."

10. In brief, on the issue of testamentary capacity, we may say that in our estimate the opinion evidence is perchance at a balance and the case is controlled by the direct testimony of the subscribing witnesses who were present and gave particular attention to the mental capacity of the testator, and who detail his expressions about the manner in which he wished to dispose of his property and to whom he intended to leave it. The issue of undue influence is not sustained.

Under the circumstances, the opportunity for Mark Sturtevant or his wife to exercise undue influence is all that is shown on the subject, by a preponderance of the testimony. Considering his antipathy towards the mother of Clark Sturtevant's children and to his guardian, which was not without foundation, and the estrangement which arose on account thereof, and the kind treatment which he says was given him by Mark Sturtevant, the disposition was a normal one which he had a right to make and is not, in our judgment, the product of any undue influence whatever.

The conclusion is that the decrees of the Circuit Court and County Court setting aside the will in question must be reversed and the cause remanded with directions to admit the will to probate as the last will and testament of A. J. Sturtevant, deceased.

REVERSED AND REMANDED. REHEARING DENIED.

HARRIS, J., not sitting.

Denied May 13, 1919.

ON PETITION FOR REHEARING.

(180 Pac. 595.)

On petition for rehearing. DENIED.

In Banc.

Mr. Stephen A. Lowell, Messrs. Raley & Raley, Mr. W. M. Peterson, Mr. C. M. White and *Mr. Frederick Steiwer,* for the petition.

Mr. James A. Fee, contra.

McBRIDE, C. J.—The brief upon the petition for rehearing practically travels over the same ground occupied by the original briefs, and most of the contentions therein seem to us to be sufficiently answered in the original opinion.

11. The test of testamentary capacity is well stated in the original opinion, but the following excerpts may serve further to elucidate the subject, and to distinguish between testamentary capacity and the capacity to contract generally.

"The result of the best considered cases on the subject seems to put the *quantum* of understanding, requisite to the valid execution of a will, upon the basis of knowing and comprehending the transaction or, in popular phrase, that the testator should, at the time of executing the will, know and understand what he was about. * * It is sufficient if the testator knew what he was doing and to whom he was giving his property * * and it is conceded in most of the cases that a man may be capable of making a will, and yet incapable of making a contract or managing his estate": *Brinkman* v. *Rueggesick,* 71 Mo. 553, citing Ray Med. Jur. 313; 2 Redfield on Wills, Chap. 4, § 10; *Thompson* v. *Kyner,* 65 Pa. St. 368; *Stubbs* v. *Houston,* 33 Ala. 555. See, also, *Stackhouse* v. *Horton,*

15 N. J. Eq. 202; *Crossan* v. *Crossan,* 169 Mo. 631 (70 S. W. 136).

12. The evidence shows that at the time the will was executed, the decedent knew he was making a will; knew the persons to whom he wished to devise his estate; knew of what his estate consisted; knew the persons whom he wished to exclude from participation in his bounty, and gave an apparently intelligent reason for so excluding them, and unless we reject the testimony of the subscribing witnesses absolutely, which we are not prepared to do, his condition measured up to every test laid down by the authorities for judging the capacity of a person to make a will. It is not sufficient to show that a testator had delusions upon *some* subject, if these delusions did not affect his mind in making his bequests: *McClary* v. *Stull,* 44 Neb. 175 (62 N. W. 501).

13, 14. It is claimed that decedent was under an insane delusion that his deceased son Clark had embezzled his money, and that his practical disinheritance of Clark's children was the result of this delusion. A delusion is a fixed belief in a proposition which has no foundation in evidence, and which is so extravagant that a reasonable man would not adhere to it. It is a fixed and extravagant belief that a fact exists where there is no evidence to furnish a basis to such belief. The rule in regard to this matter is very similar to the rule adopted in this state in regard to the verdict of a jury. If there is any evidence to sustain the verdict it must stand. So here, if there is any evidence to support the belief, it is not a delusion: *In re Scott's Estate,* 128 Cal. 57 (60 Pac. 527).

The decedent's belief in his deceased son's dishonesty had some evidence to sustain it: First, the son took charge of decedent's store, which was a

profitable business, and left it an unprofitable business; second, many bills, which the books indicated were unpaid, were found upon the statements of reputable persons to have been paid, and these sums were not accounted for.

Now these circumstances may be accounted for upon the theory of the son's incapacity for business or carelessness in keeping his accounts, but, on the other hand, there are many business men who might adopt the same theory adopted by decedent, and attribute the losses to dishonesty and peculation; and this might be especially true with an old man who had conducted the business profitably himself, and who would not be likely to see any reason why his son could not have done the same. He would naturally ask:

"Why is it that my once profitable business shows a loss under my son's management? What has become of the money which these debtors paid him, and for which there is no account?"

So there was some evidence upon which deceased could found a perfectly natural belief that the son had not dealt fairly with him. That belief was probably a mistaken one, but it was not an insane delusion.

15. His failure to make provision for Clark's children was brought about, to a great extent probably, by the act of Clark's widow in bringing an action against him for wages for his son, which she claimed were earned by him while in charge of decedent's store, and by a suit to compel the conveyance to his grandsons of two lots alleged to have been the property of Clark in his lifetime, both of which suits were settled by the guardian unfavorably to decedent and against his protests. The guardian probably acted for the best, but in view of the opinion decedent entertained in regard to Clark's transactions while in charge of the store, the settlement must have been a bitter pill and

left a feeling of resentment which showed itself in the will, and in his statement to Coutts and Ringo, that Clark's children had received enough. In this, he did not display that spirit of magnanimity and forgiveness which he might have exhibited, but the estate was his, earned by his industry and ability, and he had a perfect legal right to dispose of it as he chose.

16. Upon the question of undue influence by Mark and his wife, the contestant had the burden of proof, and we still take the view expressed in the original opinion, that the proof offered by them does not establish the charge that such undue influence was exerted. Kind treatment and even reasonable solicitation do not constitute undue influence, and this is about as far as contestant's testimony goes in this case.

17. We believe decedent, while suffering some mental impairment as the result of old age and disease, yet retained sufficient independent mentality to know what he wished to do with his property, and that the will expressed his desire in that respect.

The petition for rehearing is denied.

REVERSED AND REMANDED. REHEARING DENIED.

Argued March 18, reversed and dismissed April 8, rehearing denied May 13, 1919.

KENNEDY v. PORTLAND.

(179 Pac. 667.)

Dedication—Public Streets—Implied Dedication.

1. Where private property was used for more than ten years continuously by the public as a street with the knowledge of the owners and without protest from them, the city had a right to the use of the land as a public street by implied dedication.

[As to dedication—Acceptance implied from user, see note in 129 Am. St. Rep. 621–629.]

From Multnomah: ROBERT G. MORROW, Judge.

Department 1.

This is a suit in equity to restrain the City of Portland from collecting certain assessments for the cost of improving Fiftieth Avenue, Southeast, in said city, in front of the properties of the several plaintiffs, and to recover damages for the wrongful appropriation of plaintiffs' private property for public use without compensation. Separate suits were begun by Josephine Maher, as the owner of the land known as "Rosemary Park," and by Kennedy and Fobert as the owners of Lot 24, in an addition known as "Marysville." After issue joined, and by consent of the parties, the two suits were consolidated and tried as one. The complaints are substantially the same, except as to the extent of the alleged wrongful appropriation of land, Josephine Maher asserting that a 20-foot strip has been wrongfully taken by the city, from the north end of her property, while the other plaintiffs aver that the city has, without condemnation proceedings, seized and used a 30-foot strip from the north end of their property, as a part of the public street.

The answers plead dedication and adverse user for more than ten years, and the requisite proceedings by the city authorities for the improvement of the ground used, as a street, the completion of the work of improvement and the proper levy of the assessments.

The replies are general denials. A trial being had, there was a decree for plaintiffs and defendant appeals.

REVERSED AND DISMISSED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Walter P. La Roche*, City Attorney, and *Mr. H. M. Tomlinson*, Deputy City Attorney, with an oral argument by *Mr. Tomlinson*.

For respondents there was a brief and an oral argument by *Mr. Robert J. O'Neil*.

BENSON, J.—1. The one question presented by the record is this: Has the defendant established by the evidence, a right to the use of the land as a public street, either by implied dedication, or by adverse user? The evidence discloses that in the year 1881, one Wm. Kern filed for record in the office of the county clerk of Multnomah County, a plat of "Marysville," being a tract of land, subdivided into lots of about five acres each, such tract being intersected, according to the plat, by a street called "Garfield Street," which is now known as "50th Ave. S. E." This street is shown by the plat to be 30 feet wide. Plaintiffs Kennedy and Fobert purchased a portion of Lot 24 in Marysville, on March 25, 1911, receiving a warranty deed therefor, in which their northern boundary is identical with the southern boundary of the 30-foot strip which is the subject of this litigation. In this deed, the grantors are George W. Rauch and wife. On May 6, 1913, the same plaintiffs secured from S. D. Smalley and wife, and F. H. Freund, a quitclaim deed to that portion of the 30-foot strip lying directly north of their portion of Lot 24. On April 18, 1911, one John H. Smith filed for record a plat of "Rosemary Park" being Lot 22, and a part of Lot 27 in Marysville, and having thereafter died, the plaintiff, Josephine Maher, became the owner of Rosemary Park, as a legatee of Smith. The plat of this tract

shows Garfield Street to be 40 feet wide, the additional 10 feet being taken from the northern boundary of Lot 22. The 30-foot street designated as Garfield Street on the plat of Marysville, so far as it extended north of plaintiffs' lands, was never opened for travel until the city began the improvement proceedings which supplied the motive for this suit. West of Rosemary Park, it appears to have been recognized as a 60-foot street for a time the limit of which is not disclosed by the record. The record is silent as to why the original street, as platted, was never used, except that one witness says that it was obstructed by trees and stumps, and that so far as it touches plaintiffs' property, it was inclosed by a fence. The fence which marked the northern boundary of the land purchased by Kennedy and Fobert in Lot 24, in 1911, had been, originally, about five feet farther north, but their predecessor in interest had moved it back to its present location, exactly 30 feet from the northern boundary of the strip of land in controversy. In 1914, Kennedy built a gate across the east end of the strip in dispute, and at the same time inclosed the portion in front of his property, by extending his west line of fence across the disputed tract. These obstructions were removed by the defendant when the work of improvement was begun.

The defendant urges that these facts furnish ample evidence of a public easement, both by implied dedication, and by prescription. Plaintiffs insist that the record is wanting in any evidence of an *animus dedicandi*, which is essential to the establishment of a dedication, and that the prescriptive right must fail, because the evidence discloses that the use of plaintiffs' land arose from a mistake as to the true location of the street expressly dedicated by the plat of Marysville.

The sole question presented for our determination then, is as to the weight and effect of the evidence.

At the outset, let us keep in mind the fundamental fact that the land in controversy had been used by the general public as a street, without controversy and without objection, for many years, probably more than twenty, and in any event, considerably more than ten, before this suit was begun, and before any protesting act was performed, and that on both sides it was fenced.

The writer is unable to discover any logical reason for maintaining, in the discussion, any distinction between the acquisition of a highway by implied dedication, and by prescription in cases where the use has continued beyond the time fixed by the statute of limitations. We are confirmed in our view upon this subject by the language of Mr. Justice VAN SYCKEL, in the case of *Wood* v. *Hurd*, 34 N. J. Law, 87, which reads thus:

"In *Odiorne* v. *Wade*, 5 Pick. 421, the existence of the highway was put upon the doctrine of prescription; and in *Reed* v. *Northfield*, 13 Pick. 94 (23 Am. Dec. 662), Chief Justice SHAW held that the presumption from long and uninterrupted enjoyment would conclusively arise, that at some anterior period the road had been laid out and established by some competent authority. In the later case of *Hobbs* v. *Lowell*, 19 Pick. 405 (31 Am. Dec. 145), the same learned judge, following the lead of *Cincinnati* v. *White*, 6 Pet. 430 (8 L. Ed. 452), which has been very generally adopted, rested the public right upon the doctrine of dedication. It seems to be a mere difference in name, and of no practical importance, whether the mode in which the right is acquired is called prescription, adverse possession, or dedication, although the latter term distinctly defines the right, and its universal adoption would save the confusion which arises from the use of other terms."

We shall therefore consider this case as one in which the city relies upon an implied dedication. Is the evidence sufficient to establish the same, including the *animus dedicandi?*

In *Schwerdtle* v. *Placer County*, 108 Cal. 589 (41 Pac. 448), we find this language:

"Where the claim of the public rests upon long-continued adverse use, that use establishes against the owner the conclusive presumption of consent, and so of dedication. It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license."

Again, in *Hartley* v. *Vermillion,* 141 Cal. 339 (74 Pac. 987), the court says:

"When, as in this case, the public, or such portion of the public as had occasion to use the road, traveled over the same, with full knowledge of the land owners interested, without asking or receiving any permission, and without objection from anyone, for a period of time beyond that required by law to bar a right of action, a right in the public to the use of the road arises by prescription or implied dedication."

In *Town of Marion* v. *Skillman,* 127 Ind. 130 (26 N. E. 676, 11 L. R. A. 55), it is said:

"While the question of dedication from permissive occupation and use depends upon the intention of the owner, yet evidence of such occupation and use is one of the evidences of an intention to dedicate."

In *Gear* v. *C. C. & D. R. Co.*, 39 Iowa, 23, the defendant asked for this instruction to the jury:

"If you find from the evidence that the road leading from the Gear Ferry, past the warehouse to the Tete des Morts creek, had been used by the public as a public highway for more than ten years prior to its obstruction by the railroad company, with the knowledge, consent and permission of plaintiffs, such use amounts to

a dedication of the same to the public as a highway, and the obstruction of the same by the railroad company cannot be recovered for in this proceeding."

Upon appeal, the Supreme Court says:

"It was error, also, to refuse this. The dedication of a highway to the public may be established by the long use (more than ten years), by the public, and mere acquiescence therein by the owner."

Jones on Easements, Section 186, contains this statement of the rule:

"Where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, if the other party relies on the fact that these acts, or any of them, were permissive, it is incumbent on such party by sufficient proof, to rebut such presumption of a nonappearing grant; otherwise the presumption stands as sufficient proof, and establishes the right."

The authorities quoted are supported by the great weight of authority, and it is needless to cite more of them. The record in this case is silent as to why the land in controversy was used as a street in the first instance, and the presumption born of long-continued use, with the knowledge of the owners, and without protest from them, fully establishes defendant's contention that there was an implied dedication.

The decree is reversed and one will be entered here dismissing the suit.

REVERSED AND DISMISSED. REHEARING DENIED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Argued April 11, reversed and remanded May 13, 1919.

McINTOSH *v.* SCHOPS.

(180 Pac. 593.)

Innkeepers — Distinction from "Lodging-house Keeper" — "Boarding-house Keeper."

1. At common law, an "innkeeper" catered to the traveling public, the transient travelers who in passing through the country stopped from day to day in the pursuit of their travels, while the "lodging-house or boarding-house keeper" took care of more permanent customers, who remained for longer periods, more or less permanently.

Innkeepers—Liability to Guests.

2. An innkeeper though held to a very high degree of care for goods of his guests, does not incur such strict liability except to one who sustains the relation of a "guest," and he may be an innkeeper to some persons, "guests" as such, and only a lodging-house keeper as to others.

Innkeepers—Liability for Goods of Lodger—Pleading and Proof of Negligence.

3. The duty of an innkeeper toward the goods of a relatively permanent lodger or boarder being that of ordinary care only, and being the same duty owed by the ordinary bailee for hire and no more, there is no presumption of his negligence in case of theft or burglary.

Pleading—Admission in Answer—Effect.

4. Where the complaint of plaintiff suing a lodging-house keeper for loss of goods alleged that at all times mentioned defendant was the keeper of a common inn or hotel, which was admitted in the answer, it may be accepted as established that defendant was keeping such a place.

Innkeepers—Status as "Lodger" Rather Than "Guest."

5. Where plaintiff's occupancy of a room in defendant's hotel was of a permanent nature at a fixed rental per week or month, and extended from January 16th to April 4th, and from April 18th to March 18th, *prima facie*, in the absence of evidence to the contrary, plaintiff was a "lodger," or boarder, of a lodging-house keeper, rather than a "guest" of an innkeeper in the strict sense.

[As distinction between guest and boarder at hotel or inn, see note in **Ann. Cas.** 1914B, 729.]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 2.

The defendant was the keeper of an inn or hotel in Portland. The plaintiff was an occupant of one of the

rooms in the hotel. While plaintiff was out of his room one day, the door was forced open by a burglar, and three suits of clothes and some small articles of property were taken. He brings this action against the defendant to recover the value of such wearing apparel, etc., alleged to amount to about $84.

Reversed With Directions.

For appellant there was a brief over the names of *Mr. Frank S. Grant, Mr. James N. Davis* and *Mr. W. W. Dugan, Jr.,* with an oral argument by *Mr. Grant.*

For respondent there was a brief over the names of *Mr. Alfred P. Dodson* and *Mr. F. J. Litchtenberger,* with an oral argument by *Mr. Dodson.*

BENNETT, J.—The case seems to have been tried upon both sides, upon the theory that the relationship of guest and innkeeper subsisted between plaintiff and defendant, and that the defendant's liability was of that very high degree, amounting almost to insurance, which attached at the common law to such relationship.

We are forced to the conclusion that from the allegations in the pleadings and the proof in the case, this was not the real relationship between the parties, but that the real relationship was that of a boarding or lodging house keeper to his boarder or lodger—an altogether different relationship, calling for a different degree of care, and a much less strict rule of liability for the goods in question.

1. It is not claimed by the plaintiff that there is any statutory liability—indeed, his claim is that the statute has not affected the common-law rule. The distinction at common law between an innkeeper and a board-

ing or lodging house keeper, was that the innkeeper catered to the traveling public—the transient traveler, who, in passing through the country, stopped from day to day in the pursuit of his travels. The lodging-house or boarding-house keeper, on the other hand, took care of more permanent customers, who remained for longer periods and more or less permanently in the same place.

2. The innkeeper has always been held to a very high degree of responsibility, and if the property of his guest was stolen while under his roof, even without his fault, he was generally liable therefor. But it seems well established, that before he incurred this strict liability, it must appear, not only that he was an innkeeper or hotel-keeper, but also that the party he was entertaining should sustain the relationship of "*guest.*" The same innkeeper, who sustained that relationship to such as were "guests," might be only a lodging or boarding house keeper as to other persons who were staying with him permanently, and were not therefore "guests" within the technical meaning of the word.

The distinction and the reasons for it, as traced by Mr. Beale in the early chapters of his work on Innkeepers, is very interesting, and grew out of the disturbed and dangerous conditions of the traveling in England, in the early centuries, when the common law was growing up. The presence of the great numbers of outlaws and highwaymen, made it necessary that the traveler, passing through the country, by the crude methods of travel then in vogue, should find wayside stopping places, where he and his property could be protected from thieves and robbers; and out of this necessity and the danger of possible collusion between the innkeeper and the outlaw, grew the rule, holding

the innkeeper absolutely liable to such traveler for the loss of goods while at the inn.

The necessity of such a strict rule seems never to have existed or been recognized in the case of more permanent boarders—probably because in the case of a permanent lodger or boarder, he had a better opportunity to choose his own place of living, and he could also know in advance, just exactly what care and means of protection his landlord was adopting. This ancient distinction seems always to have been preserved in the law and still exists at this day.

In 22 Cyc. 1077, subdivision G, it is said:

"An innkeeper may, and commonly does, entertain not only merely transient guests, but other persons who stay at the inn for a considerable period, making in fact their residence there; such persons are boarders, not guests. If he (a person), is staying at the inn under a contract, by which he is to remain there a certain considerable time, and in return gets a special rate for board, he is presumably a boarder."

In Dobie on Bailments and Carriers, 249, Section 91, it is said:

"It is as important to determine who are guests as it is to decide who are innkeepers; for, as the exceptional liabilities, which will be subsequently discussed, are imposed only on those who are strictly innkeepers, so these liabilities exist solely in favor of those whose legal relation is that of guests, and not in favor of boarders, or other persons resorting to the inn. He alone, then, can hold the innkeeper to his rigorous liability who is technically a guest. That the plaintiff is not a guest is therefore always a defense to the strict liability as an innkeeper for loss or damage to the goods.

"It is clear that the definition of 'guest' involves three elements, which require separate treatment in the order named: First, a transient; second, patronizing the inn as such; third, consent of the innkeeper."

In Beale on Innkeepers and Hotels, Section 201, it is said:

"A boarder at an inn is not entitled to the exceptional responsibility of the innkeeper for the goods of his guest. So where money is deposited in the office safe and is stolen by a clerk who was not negligently employed, and where goods are stolen from the chamber of the guest, the innkeeper is not responsible."

And again:

"A passenger or wayfaring man may be an entire stranger. He must put up and lodge at the inn to which his day's journey may bring him. It is therefore important that he should be protected by the most stringent rules of law, enforcing the liability of the innkeeper. In such case, therefore, the law makes the innkeeper an insurer of the goods of his guest except as to losses occasioned by the act of God or public enemies. But as a boarder he does not need such protection, the law does not afford it. It is sufficient to give him a remedy when he shall prove the innkeeper has been guilty of culpable negligence."

And again, in Section 202, Id., it is said:

"He does not receive the boarder as part of his public duty and therefore does not undertake the extreme responsibility undertaken toward the guest's goods; but he receives the boarder and his goods to be entertained and cared for, with the single exception that he does not offer his house to a boarder as a refuge from the perils of the road. For any injury to the goods, which an innkeeper carrying on his business in the ordinary way should have guarded against, the innkeeper ought to be liable. This is usually expressed, in the language ordinarily used in connection with bailments, as that duty of 'ordinary care' which is due in bailments for the mutual benefit."

3. So the duty of an innkeeper toward the goods of such a lodger or boarder, being that of ordinary care only, and being the same duty owed by the ordinary

bailee for hire and no more, there is no presumption of negligence in case of theft or burglary, and the plaintiff must plead and prove actual negligence.

The case of *Claflin* v. *Meyer*, 75 N. Y. 260 (31 Am. Rep. 467), involved the liability of such a bailee for hire in the event of burglary, and the court said:

"But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume in the absence of proof on the point that such fire or theft was the result of his negligence."

And again:

"This burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman.

"Applying these principles to the present case, we must hold that when it appeared, as it did, that the goods were taken from the defendant's warehouse by a burglarious entry thereof, the plaintiffs should have shown that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted or contributed to cause or permit that burglary."

The same conclusion was reached by the Supreme Court of Washington in the case of *Colburn* v. *Washington State Art Assn.*, 80 Wash. 662 (141 Pac. 1153, L. R. A. 1915A, 594), where the goods in question were left in charge of a museum company for exhibition. The court said:

"Having in mind these rules touching the burden of proof and the fact that we have practically no evidence

save that of witness Hall above quoted, showing the amount of diligence or want of diligence exercised by appellant in caring for respondent's goods, and the conceded fact that they were lost by theft, it seems to us that there is such want of affirmative showing of negligence on the part of appellant that it must be held free from liability such as is here sought to be charged against it."

Mr. Van Zile in his work on Bailments and Carriers, cites the New York case, among many others, with approval, and says:

"If he proves the demand upon the warehouseman, and his refusal to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman."

And in 6 Corpus Juris, Section 61, page 1123, it is said:

"So a bailee is not liable for losses resulting without his negligence from such public disasters as the inroads of a hostile army, or the confiscation or destruction of goods by military authority, or from such private causes as robbery, burglary, or theft."

4. In this case the complaint alleges "that at all times hereinafter mentioned, the defendant was the keeper of a common inn or hotel," and this, we think, is admitted in the answer. So it may be accepted as established, that the defendant was keeping such a place.

It is also alleged "that the plaintiff was a guest of the defendant," but this is denied in the answer. The defendant alleges that:

"Defendant has been and still is engaged in keeping the Standish Hotel, renting rooms to transients and to *permanent roomers,* and plaintiff engaged room 36 on January 16, 1915, and occupied the same, and

paid rental therefor *at the rate of $2.50 per week,* to April 4, 1915, and afterward on April 18, 1915, plaintiff engaged a room in said hotel and paid rental therefor to March 18, 1917, at the rate of $12 per month."

And this is admitted in the reply.

5. So it appears that plaintiff's occupancy was of a permanent nature, at a fixed rental per week or month, and, therefore, *prima facie* (and in the absence of evidence to the contrary, he was a lodger or boarder rather than a guest). There seems to have been no evidence offered whatever on the part of the plaintiff in regard to this feature of the case.

Under these conditions we must hold that plaintiff was *prima facie* at least, not a guest of the hotel, but a more or less permanent roomer or lodger, and that the relationship of innkeeper and guest, and the resulting liability, did not exist as to him.

We cannot find any affirmative evidence whatever of neglect on the part of the defendant, and we conclude that the finding of actual negligence on his part is not sustained by evidence. Indeed, the court seems to have based its findings entirely on the presumption against an innkeeper, which, as we have seen, did not apply in this case.

The motion of the defendant for a nonsuit should have been allowed. The judgment of the court below will be reversed and the cause remanded with instructions to enter a nonsuit.

REVERSED WITH DIRECTIONS.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued on motion to dismiss appeal April 12, sustained April 15, rehearing denied May 20, 1919.

SCHULTZ *v.* WALRAD.

(179 Pac. 904, 991.)

Appeal and Error—Extension of Time for Filing Transcript—Necessity of Notice of Appeal.

1. Trial court has no jurisdiction to extend time for filing of transcript on appeal until a notice of appeal has been served.

ON PETITION FOR REHEARING.

Appeal and Error—Service of Notice of Appeal by Mail—Affidavit on Rehearing.

2. There can be no service by mail of a notice of appeal under Section 540, L. O. L., unless appellant's attorney resides in a different place from the attorney for respondents, so that an affidavit supporting petition for rehearing on the order made dismissing the appeal for lack of service of notice of appeal, which fails to show where the notice was mailed to the attorney for respondents or the residence of appellant or his attorney, is defective.

From Multnomah: ROBERT G. MORROW, Judge.

In Banc.

Action by J. C. Schultz and E. V. Maulding against B. L. Walrad. Judgment for plaintiffs, and defendant appealed. Motion to dismiss appeal. SUSTAINED.

Mr. Frank Schlegel, for the motion.

Mr. Milo C. King, contra.

PER CURIAM.—1. This is a motion to dismiss an appeal.

Judgment was entered against defendant on December 5, 1918. Notice of appeal was served on January 20, 1919. Before the notice was served, and on January 14, 1919, the defendant applied for, and secured from the Circuit Court, an order extending the time within which to file the transcript on appeal until March 15, 1919. No other extension was granted and plaintiff moves to dismiss the appeal.

The court had no jurisdiction to extend the time for filing a transcript on appeal until a notice of appeal had been served: *Wolf* v. *City Ry. Co.*, 50 Or. 64 (85 Pac. 620, 91 Pac. 460, 15 Ann. Cas. 1181). This court, as will be observed from a perusal of the above cited case, has been exceedingly liberal in its construction of the statute permitting an extension of time for filing transcripts in this court, but to so construe it as to permit a party to have such extension before he has even given notice of his intention to appeal, would be invoking a liberality beyond all reason and beyond the intent of the statute. As said in *Kelley* v. *Pike*, 17 Or. 330 (20 Pac. 685):

"An appeal from the Circuit Court to this court, under our system of practice, is a new proceeding."

It would seem that at least the first step required in such proceeding, which consists in the service and filing of a notice, should be taken, before the Circuit Court has authority to authorize an extension of time to file a transcript.

The motion to dismiss is sustained.

APPEAL DISMISSED.

Denied May 20, 1919.

PETITION FOR REHEARING.

(179 Pac. 991.)

On petition for a rehearing on motion to dismiss an appeal. APPEAL DISMISSED. REHEARING DENIED.

Mr. Milo C. King, for the petition.

Mr. Frank Schlegel, contra.

PER CURIAM.—This is a petition for rehearing upon the order made dismissing defendant's appeal: *Ante*, p. 315 (179 Pac. 904).

2. In the petition and affidavit accompanying it, it is set up that previous to the notice of appeal, which appears in the transcript, upon which the motion to dismiss was based, the appellant's attorney served a notice of appeal upon Frank Schlegel, attorney for respondents, by mailing to him at his office in Portland, Oregon, on December 19, 1918, a duly certified copy; that upon the succeeding day the attorney for appellant called at said Schlegel's office to secure an acceptance of service in person, but found the attorney absent; that on December 21, 1918, appellant's attorney inadvertently filed the notice without any proof of service being indorsed upon it; that an hour later he met counsel for respondents and requested him to step into the clerk's office and sign the acknowledgment on the original notice of appeal, which the attorney refused to do on the ground that it was filed and of record; and thereafter the clerk of the court refused to allow counsel to make a certificate of service by indorsement thereon for the same reason. Thereupon, for the purpose of completing the record, counsel for appellant served a second notice of appeal and undertaking, which appears in the original transcript herein, and caused it to be certified to this court. He now moves for leave to amend the transcript by filing the first notice above mentioned, with proof of service, to conform to the facts set forth in the affidavit.

The affidavit does not show the facts necessary to constitute service by mail. Section 540, L. O. L., reads as follows:

"Service by mail may be made, when the person for whom the service is made, and the person on whom it is to be made, reside in different places, between which there is a communication by mail, adding one day to the time of service for every fifty miles of distance between the place of deposit and the place of address."

In *Fisk* v. *Hunt,* 33 Or. 424 (54 Pac. 660), the court used the following language:

"It was also insisted that the constable could have made a good and sufficient return of service by mail, but the contention is not tenable. We would infer from the affidavit that the plaintiff's residence was at Wagner, while that of defendants was at Winlock,—different places within Grant County, between which there was communication by mail. But the deposit was made in the postoffice at Wagner, addressed to the respondent at Wagner. The statute provides (Hill's Ann. Laws, 528, 529) that 'service by mail may be made, when the person for whom the service is made, and the person on whom it is to be made, reside in different places, between which there is a communication by mail, adding one day to the time of service for every fifty miles of distance between the place of deposit and the place of address.' 'In case of service by mail, the copy must be deposited in the postoffice, addressed to the person on whom it is to be served, at his place of residence, and the postage paid. The service shall be deemed to be made on the first day after the deposit in the postoffice that the mail leaves the place of deposit for the place of the address, and not otherwise.' These sections provide for substituted service in derogation of the common law, and a strict and literal compliance with them is required to confer jurisdiction on the appellate tribunal: 2 Enc. Pl. & Prac. 226. Such being the case, the deposit, to have been effectual as contemplated thereby, should have been made in the postoffice at Winlock, the appellant's place of residence, they being the parties for whom service was attempted; and it was insufficient to make the deposit at Wagner, the place of residence of the party on whom the service was intended to have

been made: *Reed* v. *Allison*, 61 Cal. 461. These considerations affirm the judgment of the court below, and it is so ordered."

From this it will be seen that there can be no service by mail unless the parties reside in different places, and there can be no such service where both the parties reside in the same place and have the same postoffice address. The affidavit fails to show where the notice was mailed or the residence of the appellant or his attorney, and is, therefore, defective.

As to whether the service of a second notice and undertaking, and the filing of a transcript here under that, should be deemed an abandonment of the appeal originally attempted, we express no opinion.

The petition for rehearing is denied.

APPEAL DISMISSED. REHEARING DENIED.

Argued April 22, reversed and decree entered May 20, 1919.

TUCKER *v.* NUDING.

(180 Pac. 903.)

Appeal and Error—Notice of Appeal—Sufficiency.

1. Under Section 550, subdivision 1, L. O. L., a notice of appeal, giving name of the court and parties, date of decree, and informing respondent that appellant appeals from decree, is sufficient.

Easements—Necessity—Presumption—Implied Grant.

2. Where tract conveyed is surrounded, at least in part, by other lands of grantor, there is a presumption of fact that a way of necessity is impliedly granted across grantor's property when no other adequate means of access is available.

Easements—Necessity—Access by Water.

3. Ordinarily, no right of way by necessity pertains to land which borders, and to which there is adequate access, upon the sea.

Easements—Necessity—Duration.

4. A right of way by necessity exists only while person claiming it has no other adequate means of access.

Easements—Necessity—Conveyance.

5. Where owner of estate imposes on one part an obvious and reasonably necessary servitude in favor of another part, the servitude passes with a conveyance of dominant portion by implied grant.

Easements—Way of Necessity—Public Lands.

6. A grantee is not precluded from claiming right of way by necessity over remaining lands of his grantor by fact that granted land was partly surrounded by public domain over which grantee had a license to pass, revokable by entry under federal land laws.

Easements—Way of Necessity—Description.

7. A right of way by necessity *held* described in complaint with sufficient definiteness by reference to a roadway.

Easements—Necessity—Adverse Possession.

8. A right of way by necessity can be destroyed only by adverse possession sufficient to create a prescriptive right, and is unaffected where possession was only for one and one half years.

From Jackson: FRANK M. CALKINS, Judge.

Department 2.

By this suit plaintiff seeks to enjoin defendant from closing a roadway extending from the premises of plaintiff across defendant's land to the public highway. The Circuit Court rendered a decree in favor of defendant, and plaintiff appeals.

The facts are as follows: One John Compton owned 360 acres of land in Jackson County. This land laid in the form of a square and consisted of the northwest quarter, and the west half of the northeast quarter, and the north half of the southwest quarter, and the northwest quarter of the southeast quarter of section 8, township 36 south, range one east of the Willamette meridian. The only county road or public highway available for the whole tract runs through the northwest quarter of the land. In 1896, Compton sold and conveyed by warranty deed to E. H. Tucker, father of plaintiff, a rectangular piece of this land containing 72 acres lying in the southeast corner thereof. E. H. Tucker conveyed the same to plaintiff by a like

conveyance. This 72-acre tract we shall hereafter refer to as the Tucker tract. It did not touch the county road and had been farmed separately from the rest of the Compton land prior to its sale, and had its own set of farm buildings. From the Tucker tract to the county road there was a well-defined roadway running across the remainder of the Compton land. This roadway had been used for a number of years previous to the sale of the Tucker tract as the only means of ingress and egress to and from the county road. After purchasing the 72-acre tract, the elder Tucker moved on to it and for about ten years continuously used this roadway as his only means of ingress and egress. In the meantime, John Compton sold the remaining portion of the land to one Hazen. In 1907 Hazen closed the roadway leading from the Tucker land to the county road and kept it closed against the elder Tucker for about a year and a half. At this time the land adjoining the Tucker tract on the south and east was open government land, and during the time the roadway was closed, Tucker drove back and forth across his field and over the government land, a distance of some two miles, to reach the county road. At the end of a year and a half Tucker contracted to sell his tract to a third party and the purchaser went into possession and it has been used continuously ever since by the occupants of the Tucker tract until just before the commencement of this suit, when the defendant, who had acquired Hazen's title to the remainder of the original tract, again closed the road.

Plaintiff now owns the Tucker tract. The adjoining government land has been settled upon and fenced, and there is now no possible means of access to the Tucker

tract except by the roadway in question. It is alleged in the complaint:

"That plaintiff is the owner of an easement consisting of a right of way twenty feet in width, being ten feet on each side of the center line hereinafter described over and across the premises of defendant for the purpose of passing over the same with horses and vehicles, or in any other reasonable manner, and for ingress to and egress from the premises of the plaintiff above described, which center line of said right of way is described as follows, to wit:

"Commencing at the center line of the roadway which is now marked out and constructed across said premises of defendant; which said roadway commences on the north line of plaintiff's premises above described approximately thirty rods west of the northeast corner thereof, and extending along the center line of said roadway as the same is now marked out and constructed across defendant's said land from said point of beginning in a northerly direction to the county road running along the north line of defendant's said premises. Which said easement and right of way is appurtenant to the premises owned by plaintiff, as aforesaid."

That the defendant has unlawfully closed and now does wrongfully obstruct the right of way, and has forbidden plaintiff from passing along or over the same. The defendant interposed a demurrer to the plaintiff's complaint on the ground that the same did not state facts sufficient to constitute a cause of suit, which was overruled. Defendant objected to the introduction of any testimony upon the same ground upon which the demurrer was based, and for the further reason that there was no allegation in the complaint basing the right of a roadway on the ground of necessity, and that at the conclusion of plaintiff's case moved for a nonsuit on the ground that plaintiff had failed to prove any such way of necessity. It

appears from the record that Compton agreed to mention the right of way in his deed to Tucker, but failed to do so. It is shown that the road is on the best grade that can be found leading from the Tucker tract to the county road, and is a necessary, reasonable and fair outlet for the occupants of the Tucker tract; that it was used for thirty years except during the one and one-half years it was closed, and during that time by some persons other than plaintiff who were permitted by the owner of the Compton tract to pass through. REVERSED. DECREE ENTERED.

For appellant there was a brief and an oral argument by *Mr. Porter J. Neff.*

For respondent there was a brief and an oral argument by *Mr. George M. Roberts.*

BEAN, J.—1. A preliminary question is submitted by a motion of defendant to dismiss this appeal for the reason that the notice of appeal does not describe the decree appealed from. The notice of appeal contains the name of the court, the name of the parties plaintiff and defendant, following this it is directed to the defendant and his attorney and notifies them that the plaintiff appeals "to the Supreme Court of the State of Oregon, from the decree in the above-entitled suit, rendered by the above-named court on March 23, 1918, and from the whole of said decree." The record discloses that the decree appealed from was rendered in the suit named on the date mentioned in the notice of appeal. It does not appear from the record that there was any other judgment or decree passed by the trial court on the date named or at any other time, so that there was no possibility of the de-

fendant's being misled as to the decree appealed from or any chance for a mistake as to the description of the decree contained in the notice. It is submitted by defendant that neither the notice, nor the undertaking on appeal states in whose favor the decree was rendered. A notice of appeal which gives the name of the court and of the parties to the suit, the date of the judgment or decree without any other description, and informs the respondent that the appellant appeals from the judgment or decree in the suit is sufficient: Section 550, subd. 1, L. O. L.; *Ream* v. *Howard,* 19 Or. 491 (24 Pac. 913); *Fraley* v. *Hoban,* 69 Or. 180 (133 Pac. 1190, 137 Pac. 751). In construing the section of the statute above referred to, it has been repeatedly held by this court that such notice is sufficient if it describe with reasonable certainty the decree complained of, the court in and the time at which such decree was given, the names of the parties to the suit, and the fact that one or more of them intend to appeal to the Supreme Court: *Mendenhall* v. *Elwert,* 36 Or. 375, 379 (52 Pac. 22, 59 Pac. 805), and cases there cited. Tested by the above statute and the rule enunciated by this court, the notice of appeal in this suit describes the decree complained of with reasonable certainty, and conforms to the other requirements prescribed by the decisions of this court, and is sufficient. The motion to dismiss the appeal is therefore overruled.

ON THE MERITS.

It is conceded in this case that the 72-acre tract originally purchased by E. H. Tucker, now owned by the plaintiff, was a portion of the 360-acre tract known as the Compton land, which was accessible by means of the county road running through the northwest corner of the land; that at the time of the conveyance

by John Compton to the predecessor in interest of plaintiff of the Tucker tract, this tract was not adjacent to any public highway; that the only means of ingress and egress to and from the Tucker tract connecting with the public highway was the roadway in question.

2, 3. The universally established rule is that where a tract of land is conveyed which is separated from the highway by other lands of the grantor, or which is surrounded by his lands, or by his and those of third persons, there arises by implication in favor of the grantee a way of necessity across the premises of the grantor to the highway: 9 R. C. L., § 31, p. 768; *Brown* v. *Kemp,* 46 Or. 517 (81 Pac. 236); *Collins* v. *Prentice,* 15 Conn. 39 (38 Am. Dec. 61); *Robinson* v. *Clapp,* 65 Conn. 365 (32 Atl. 939, 29 L. R. A. 582); *Doten* v. *Bartlett,* 107 Me. 351 (78 Atl. 456, 32 L. R. A. (N. S.) 1075); *Pettingill* v. *Porter,* 8 Allen (Mass.), 1 (85 Am. Dec. 671, and note); *Adams* v. *Marshall,* 138 Mass. 228 (52 Am. Rep. 271); *Powers* v. *Harlow,* 53 Mich. 507 (19 N. W. 257, 51 Am. Rep. 154); *Moore* v. *White,* 159 Mich. 460 (124 N. W. 62, 134 Am. St. Rep. 735). The basis of such right is the presumption of a grant arising from the circumstances of the case. The necessity does not of itself create a right of way, but it is evidence of the grantor's intention to convey one, and raises an implication of a grant. The presumption, however, is one of fact, and whether or not the grant is to be implied, depends upon the terms of the deed and the facts in the case. The underlying principle is that whenever one conveys property, he also conveys whatever is necessary to its beneficial use, coupled with the further consideration that it is for the public good that land should be occupied. If one has an outlet over his own land, although less convenient, he cannot

claim a right over the premises of another; or if there already exists a road accessible to him, though perhaps very inconvenient or in a very bad condition, a way by necessity cannot ordinarily be implied. Ordinarily no right of way by necessity exists where the land to which such right of way is claimed borders on the sea. Although where such a way is inadequate the holding is often otherwise: 9 R. C. L., § 31, p. 768; *Kingsley* v. *Gouldsborough Land Imp. Co.*, 86 Me. 279 (29 Atl. 1074, 122 Am. St. Rep. 211, 136 Am. St. Rep. 699, 25 L. R. A. 502, notes).

4. A right of way of necessity exists only where the person claiming it has no other means of passing from his estate into the public street or road. It is so limited in respect to its duration that although it remains appurtenant to the land in favor of which it is raised so long as the owner thereof has no other means of access, yet the moment the owner of such a way acquires by purchase of other land or otherwise a way of access from a highway over his own land to the land to which the way belongs, the way of necessity is at an end. In other words, a way of necessity ceases as soon as the necessity ceases: Washburn on Easements (4 ed.), pp. 258, 260. This author there states that:

"It would be simply absurd under the common law to pretend that A could, by any form of grant, create a servitude upon the land of a stranger in favor of land which he should convey to his grantee."

5. Moreover, where the owner of an estate imposes on one part an apparent and obvious servitude in favor of another, and at the time of the severance the servitude is in use and is reasonably necessary for the fair enjoyment of the other, such servitude is described as a *quasi* easement and passes with a conveyance of the dominant tenant by implied grant: *German Sav. &*

Loan Soc. v. *Gordon*, 54 Or. 147 (102 Pac. 736, 26 L. R. A. (N. S.) 331); *Bean* v. *Bean*, 163 Mich. 379 (128 N. W. 413); *Martin* v. *Murphy*, 221 Ill. 632 (77 N. E. 1127); *Ellis* v. *Bassett*, 128 Ind. 118 (27 N. E. 344, 25 Am. St. Rep. 421); *Goodall* v. *Godfrey*, 53 Vt. 219 (38 Am. Rep. 671).

6. It is contended by the defendant, and as we understand was the reason of the denial of plaintiff's claim by the trial court, that as the Tucker tract was partially surrounded by the public domain at the time of the original conveyance from Compton to the senior Tucker, that the plaintiff could acquire a right of way over the public domain. It is not a defense to plaintiff's complaint that he could acquire another right of way, otherwise a way of necessity would only be created over one of two parcels of land of which the grantor was the owner, when the land conveyed is wholly surrounded by what has been the grantor's other land. This is not the rule as shown by the authorities above referred to. It is true a right of way over the public domain could be obtained by taking the necessary proceedings for the establishment of a public highway. The same might be said as to land in private ownership. The public domain is not a public highway like the sea. It may be that a public highway can be more easily established over government land than over that owned by private individuals, but this is not the test. The test is, could the Tucker tract be reached by means of any public highway, or by any adequate way to which the grantee, Tucker, had a right? That is, did the Tucker tract border on any public highway or way that was accessible to the occupants of the land by which they could reach the county road? The right of passage over government lands referred to was a mere revocable license by sufferance

which might be terminated at any time by settlement of the lands under the United States land laws. Another means of access to the property sufficient to prevent the implication of a way by necessity must be reasonably adequate to meet the requirements of the situation, and to enable the granted land to be used for the purposes for which it is suitable, and acquired: *Camp* v. *Whitman,* 51 N. J. Eq. 467 (26 Atl. 917); *Ipswich* v. *Proprietors of Jeffrey's Neck Pasture,* 174 Mass. 572 (55 N. E. 642).

7. The way claimed by plaintiff is definitely described in the complaint by reference to the roadway now marked out and constructed across the premises of the defendant. The road so constructed and described served as a monument for the whole distance of the roadway. It is well known that boundaries of land may be described in conveyances by means of a road. Such a monument is more lasting than stakes which are often referred to for such purposes. The objection of the defendant to the description of the roadway pertains more particularly to perpetuation of the delineation of the way than to the definiteness thereof. The complaint substantially portrays the facts of the case above stated and shows that plaintiff is entitled to a way of necessity over the land of the defendant by an implied grant from Compton to plaintiff's grantor. The demurrer to the complaint was properly overruled. The objection to the testimony is not well taken.

8. The fact that such roadway was closed for about a year and a half beginning about 1907 would not defeat plaintiff's right. It merely shows Tucker was slow to litigate. Tucker's right to the way having been vested by implied grant, nothing short of a use by the owner of the servient estate adverse to the

enjoyment of the easement for a period sufficient to create a prescriptive right, will destroy the right granted: 14 Cyc. 1187, and cases cited. It follows that the decree of the lower court should be reversed and one entered in accordance with the prayer of plaintiff's complaint. The decree of the lower court should therefore, be reversed. One will be entered enjoining defendant from obstructing or interfering with plaintiff's free use of the right of way described in the complaint, to the extent of sixteen feet in width or so much thereof as may be necessary as a means of ingress to and egress from the premises of plaintiff. REVERSED. DECREE ENTERED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued April 15, affirmed May 20, 1919.

RUGH *v.* SOLEIM.*

(180 Pac. 930.)

Justices of the Peace — Undertaking on Appeal — Limitation in Amount.

1. It is sufficient that an undertaking on appeal from a Justice Court follow the terms of the statute, and it should not be limited in amount, since to stay proceedings it must provide that appellant will satisfy any judgment that may be given against him on the appeal.

Justices of the Peace—Undertaking on Appeal—Waiver of Right as to Justification of Surety.

2. Where appellees on an appeal from a justice of the peace failed to except to the sufficiency of the surety or to require that he justify as provided by Section 2461, L. O. L., they waived their right in that

*On the question of power of legislature to require contracts for commissions for finding a purchaser for real estate to be in writing, see note in 33 **L. R. A. (N. S.)** 973.

On necessity that agent's authority to purchase or sell real property be in writing to enable him to recover compensation for his services, see notes in 44 **L. R. A.** 601; 9 **L. R. A. (N. S.)** 933.

REPORTER.

respect, so that the filing of the transcript perfected the appeal as provided by Section 2463.

Justices of the Peace—Appeal—Undertaking—Justification of Sureties.

3. That a surety subscribed the affidavit of justification to an undertaking on appeal from a justice of the peace before the appeal was taken did not lessen his liability.

Brokers—Contracts for Compensation—Statute of Frauds—Sufficiency of Memorandum.

4. A contract for the exchange of land drawn up by a real estate broker, signed by the broker's principal and the other party to the exchange, providing for a commission to be figured in regular manner and for the payment of the customary sum, but not stating to whom payable, not being a contract made for the benefit of the broker, and the broker having no privity or interest therein, was not a memorandum sufficient to satisfy the statute of frauds (Section 808, L. O. L.).

Brokers—Severable Contracts—Contract to Sell Realty and Personalty.

5. A contract whereby a broker was to sell or trade real and personal property providing for a lump sum without reference to the separate value of any particular item *held* not severable as to the realty.

Brokers — Action for Compensation — Unwritten Contracts Within Statute.

6. A contract whereby a broker is to sell real and personal property, including services within the statute of frauds, is void when not in writing as required by Section 808, L. O. L., notwithstanding part of the property is personal; action thereon being on the contract, and not for the *quantum meruit*.

Appeal and Error—Review—Questions of Fact—Direction of Verdict.

7. Where both plaintiff and defendant rest the case and move for directed verdict, the direction of the court in that respect must be sustained if any of the evidence will support it.

Customs and Usages—Contracts as Modified by Custom—Requisites.

8. To be binding, a custom must be reasonable, general, known to the parties, or of such general notoriety that their knowledge of it must be presumed.

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 1.

The following is the essential allegation of the plaintiffs' complaint:

"That a few months prior to November 6, 1916, the defendant employed the plaintiffs to try and trade or sell 185 acres of land in Lane County, Oregon, and to

trade or sell some livestock and other personal property for defendant, and that on the sixth day of November, 1916, plaintiffs found and had a man named F. L. Gibbs as a prospective customer and so notified the defendant, and defendant offered to pay plaintiffs the customary sum as commission if plaintiffs would draw up a contract between the said F. L. Gibbs and defendant, stating that said Gibbs would trade certain property to defendant for the above-mentioned property, and cause said F. L. Gibbs to sign same, and if the plaintiffs would help defendant close said deal and get the papers executed and get the agreement executed by said F. L. Gibbs on his part, and defendant offered to figure said commission in the regular manner, and plaintiffs accepted said offer and performed said acts for defendant, and caused said deal to be properly closed to the satisfaction of the defendant and to be properly executed by said F. L. Gibbs and by defendant."

The remainder of that pleading gives data by which the plaintiffs compute the amount of their demand and avers that the same has not been paid.

Aside from admitting the partnership relation of the plaintiffs, the answer denies all the allegations of the complaint and alleges in substance that there was no agreement in writing respecting the things mentioned in the declaration.

The reply traverses the answer.

The action was originally commenced in the Justice's Court and terminated in a judgment for the plaintiffs on January 18, 1918. On January 21, 1918, defendant served and filed in the Justice's Court a notice of appeal together with an undertaking dated January 19, 1918, signed by himself and Thomas Soleim as surety, the latter of whom signed the affidavit of justification on the date last named. The body of the undertaking is here quoted:

"Whereas, the above-named defendant is desirous of appealing from that certain judgment rendered and entered in the above-entitled court in favor of said plaintiffs and against the said defendant on the 18th day of January, 1918, for the sum of $162.50 together with costs and disbursements taxed in the sum of $9.25, and from the whole thereof, to the Circuit Court of the State of Oregon for Lane County, now, therefore, we, Ole Soleim, defendant and principal, and Thomas Soleim, surety, do hereby undertake, promise and agree that the above-named defendant as appellant will pay all costs and disbursements that may be awarded against him on the appeal, and that he will satisfy any judgment that may be given against him in the appellate court on the appeal."

The plaintiffs moved the Circuit Court to dismiss the appeal on substantially the following grounds: That the transcript fails to show what, if any, transactions were had in the Justice's Court after the notice of appeal and undertaking were filed and during the five days allowed to the plaintiffs by the statute in which to object to the surety; that the undertaking is not sufficient in point of law, because it does not state any amount as a penal sum or any amount for which any individual is bound; that no transcript was filed in the Circuit Court since the appeal was perfected, if it was perfected; that the surety justified and filed the undertaking before the notice of appeal was either served or filed; and, finally, that there was no sum fixed for which the surety should give an undertaking. The Circuit Court refused to dismiss the appeal. At the close of the testimony for the plaintiffs in a jury trial which followed, the defendant rested and moved the court to direct a verdict for the defendant, substantially on the ground that there was no evidence sustaining the plaintiffs' claim within the statute of frauds. The plaintiffs also moved the court to direct

a verdict in favor of themselves in the amount prayed for in their complaint. In this situation the court directed a verdict for the defendant and from the resulting judgment the plaintiffs appealed.

AFFIRMED.

For appellants there was a brief over the names of *Mr. H. E. Slattery* and *Mr. A. K. Meek,* with an oral argument by *Mr. Slattery.*

For respondent there was a brief and an oral argument by *Mr. Fred E. Smith.*

BURNETT, J.—1. An appeal based upon written notice thereof is taken from the Justice's Court by serving such a notice, filing the original with proof of service indorsed thereon by the justice and by giving an undertaking for costs and disbursements on the appeal, but the undertaking does not stay the proceedings unless it further provide that the appellant will satisfy any judgment that may be given against him in the appellate court on the appeal. The undertaking would have been void had it been limited in amount: *State ex rel.* v. *McKinmore,* 8 Or. 207; *Sanborn* v. *Fitzpatrick,* 51 Or. 459 (91 Pac. 540); *Sutton* v. *Sutton,* 78 Or. 9 (150 Pac. 1025, 152 Pac. 271). In that respect, since the undertaking is in the terms of the statute, it is sufficient. Regarding the justification of surety, Section 2461, L. O. L., relating to proceedings in Justice's Courts, declares:

"All sureties on an undertaking on appeal must have the qualifications of bail upon arrest, and if required by the adverse party, within five days after filing the undertaking, they must justify before the justice in like manner."

2. The plaintiffs do not pretend to have excepted to the sufficiency of the surety or made any requirement

that he justify. Hence they must be deemed to have waived that right. Moreover, the bill of exceptions discloses that on the hearing of the motion to dismiss the appeal in the Circuit Court the defendant offered to allow the plaintiffs even then to except to the sufficiency of the surety and that he would justify to the satisfaction of the court, but this offer was not accepted. The waiver of this right takes with it all that depends upon it; which lets into operation the provision of Section 2463, L. O. L., stating that:

"Upon the filing of the transcript with the clerk of the Circuit Court the appeal is perfected."

In the absence of any attempt to require the surety to justify the plaintiffs cannot now abjure their waiver and complain that the appeal was not perfected.

3. The fact that the surety subscribed to the affidavit of justification before the appeal was taken cannot lessen his liability thereon, and hence the plaintiffs were not harmed by that action. It is not pretended that there were any proceedings in the Justice's Court after the filing of the undertaking and the allowance of the appeal. The transcript of the Justice's Court proceedings forming a part of the transcript on appeal and brought into this court by the plaintiffs, appears on inspection to be regular as against any of the objections urged by the motion to dismiss. There was no error in the ruling of the Circuit Court denying this motion.

4. Confessedly, there was no writing signed by the defendant authorizing or employing the plaintiffs as an agent or broker to sell or purchase the real estate mentioned, within the meaning of Section 808, L. O. L., declaring such agreements to be void unless the same or some note or memorandum thereof expressing the consideration be in writing and subscribed by the

party to be charged, and declaring that no evidence other than the writing shall be given in such cases except in the instances provided by law respecting lost instruments and the like. It seems that the plaintiffs drew up a memorandum of the contract between the defendant and one Gibbs, with whom the former exchanged properties, which memorandum was signed by both Gibbs and the defendant and contained this clause:

"Commission on deal to be figured in regular manner and we both agree to pay customary sum."

This was not a contract made directly for the benefit of the plaintiffs. It was a transaction between other parties, in which the plaintiffs had no privity or interest and they cannot claim anything under that stipulation. Although Gibbs and Soleim "both agree to pay customary sum," it is not stated to whom they are to pay it, thus making a situation analogous to those portrayed in *Parker* v. *Jeffery*, 26 Or. 186 (37 Pac. 712), and *Washburn* v. *Interstate Investment Co.*, 26 Or. 436 (38 Pac. 620), where a general promise to advance money for payment of debts or claims without specification of what particular demands are to be paid affords no cause of action in favor of one who might be indirectly benefited by the performance of the promise. The excerpt quoted above is not such a memorandum as satisfies the statute of frauds in the interest of the plaintiffs. There was therefore an utter failure of proof within the meaning of this statute authorizing them to recover for services as brokers in the sale or purchase of real estate for commission.

5, 6. It is claimed, however, that inasmuch as they allege that some personal property was to be included in the deal as well as their services for drawing up the contract and helping to close the deal, the

plaintiffs are entitled to recover at least for the services other than acting as a broker to secure a purchaser for real property. The contract stated, however, is not a severable one. It is for a lump sum without reference to the separate value of any particular item and hence, as it includes services within the statute of frauds, the whole stipulation is void and cannot be enforced as such, the action being plainly upon the contract as alleged and not for the *quantum meruit: Banks* v. *Crow,* 3 Or. 477; *Horseman* v. *Horseman,* 43 Or. 83 (72 Pac. 698); *Grant* v. *Grant,* 63 Conn. 530 (29 Atl. 15, 38 Am. St. Rep. 379); *Pond* v. *Sheean,* 132 Ill. 312 (23 N. E. 1018, 8 L. R. A. 414); *Becker* v. *Mason,* 30 Kan. 697 (2 Pac. 850); *Dennis* v. *Kuster,* 57 Kan. 215 (45 Pac. 602); *Jackson* v. *Evans,* 44 Mich. 510 (7 N. W. 79); *Thayer* v. *Rock,* 13 Wend. 53; *Clark* v. *Davidson,* 53 Wis. 317 (10 N. W. 384); *Ellis* v. *Cary,* 74 Wis. 176 (42 N. W. 252, 17 Am. St. Rep. 125, 4 L. R. A. 55); *Kessler's Estate,* 87 Wis. 660 (59 N. W. 29, 41 Am. St. Rep. 74); *R. & L. Co.* v. *Metz,* 175 App. Div. 276 (160 N. Y. Supp. 145); *Quirk* v. *Bank of Commerce & Trust Co.,* 244 Fed. 682 (157 C. C. A. 130). It would be an evasion of the statute if a real estate broker assuming to act under oral appointment to negotiate a sale of land, should be allowed to tack his claim for that service to another demand for drawing a deed and make the latter the device by which he could recover on an agreement which the law says is void unless it is embodied in a writing containing certain prescribed terms. The directed verdict was a proper solution of the issue.

7, 8. Another point of view leading to an affirmance of the ruling of the Circuit Court is illustrated by *Patty* v. *Salem Flouring Mills Co.,* 53 Or. 350 (96 Pac. 1106, 98 Pac. 521, 100 Pac. 298), teaching the doctrine

that when both plaintiff and defendant rest the case and move the court for a directed verdict, the direction of the court in that respect must be sustained if any of the evidence will support it. An essential element of the case for the plaintiffs in the instant contention was the establishment of a custom regulating the rate for calculating commissions. It is elementary that to be binding a custom must be reasonable, must be general and must be known to the parties or be of such general notoriety that their knowledge of it must be presumed. The only witnesses who testified about a custom controlling the rate of computation were two of the plaintiffs. There is no evidence in the record tending to show that the custom was either general or was known to the defendant. Very properly, then, the Circuit Court might conclude that the plaintiffs had failed to establish this essential branch of their case and hence was justified in directing a verdict for the defendant on account of failure of proof in that respect. There is no error in the rulings of the Circuit Court. The judgment is therefore affirmed. AFFIRMED.

McBRIDE, C. J., and BEAN and BENSON, JJ., concur.

Argued April 4, affirmed May 20, 1919.

UKASE INV. CO. *v.* SMITH.

(181 Pac. 7.)

Partition—Persons Who can Sue—Lienholders.

1. Under Section 435, L. O. L., providing that the only persons who can sue in partition are those who hold as tenants in common, have an estate of inheritance, or for life or years, or a vested remainder or reversion, a mere lienholder cannot institute such a suit.

Mortgages—Nature of Mortgagee's Right.

2. A mortgagee has no estate or title to realty, but only a lien which is enforceable by foreclosure of his mortgage.

Partition — Relief Incidental to Partition — Encumbrances on Property—Mortgage Lien.

3. Under Sections 422–483, L. O. L., governing the partition of real property, reading together Section 437, making the lien of a creditor or an undivided portion a lien upon the severed portion thereafter, and Section 461, requiring notice to be given that the estate is sold subject to a lien, all that can be done in a suit of partition concerning a mortgage lien is to attach it to the partitioned portion of the property to which it belongs.

Abatement and Revival — Another Action Pending — Identity of Causes of Action.

4. A mortgage foreclosure suit is not abated by a pending suit for partition of the mortgaged premises brought by the mortgagor and to which the mortgagee was made a party defendant, the procedure for foreclosure under Sections 422–434, L. O. L., affording greater relief to the mortgagee than he could obtain in a partition suit, which is intended to adjust rather than enforce the rights of parties, and under which no personal decree against the debtor could be obtained.

Abatement and Revival—Other Action Pending.

5. *Lis pendens* is not a good plea unless the judgment in the first action, in affording the same or greater relief, would bar a judgment in the second.

[As to abatement and revival—Another action pending, see note in **Ann. Cas. 1914D, 1007.**]

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 1.

The plaintiff brought this suit to foreclose a mortgage given to it by Walter V. Smith and his wife upon his undivided interest in fee in certain real estate described in the complaint. The defendant, Welcome, is made a defendant on the allegation that he is the holder of a tax certificate for taxes assessed and unpaid on Smith's share in the property.

Smith and his wife interposed a plea in abatement to the effect that before the commencement of the instant foreclosure proceeding he had instituted a suit to partition the property to which suit the plaintiff here was made a defendant, and that as such it has

there answered declaring the amount and nature of its lien by virtue of the mortgage in question and contended that the realty could not be divided without material injury to the rights of the parties, in consequence of which the entire estate should be sold and, among other things, that the proceeds of the sale of Smith's portion should be applied to the payment of such judgment as the plaintiff here might recover in its foreclosure suit which was pending at the time its answer was filed.

A demurrer to this plea was sustained by the Circuit Court and, as stated in the brief of the appellant, Walter V. Smith:

"Only one question is presented to the court by the appeal, namely, Can the plaintiff maintain its suit over the objection of the defendants while the partition suit is pending and undetermined?"

AFFIRMED.

For appellant there was a brief over the names of *Mr. A. H. McCurtain* and *Messrs. Bauer & Greene,* with an oral argument by *Mr. McCurtain.*

For respondent there was a brief over the name of *Messrs. Teal, Minor & Winfree,* with an oral argument by *Mr. Wirt Minor.*

BURNETT, J.—Partition of real property is governed by statute. The procedure laid down in this state is part of the Code of 1862, which contains also provisions for the foreclosure of liens upon real property. The latter is delineated in Chapter 5 of Title VI, L. O. L., and the former in the following chapter, L. O. L., Sections 422–483. It is primary learning that all parts of the same statute must be construed together and so that all shall stand if possible.

1. As stated in Section 435, L. O. L., the only persons who can institute a suit in partition are those who hold as tenants in common, and have an estate of inheritance, or for life or years, or by virtue of a vested remainder or reversion in any real property. No mere lienholder can sue in partition. It is required by the following section that the interest of all persons in the property shall be particularly set forth in the complaint, as far as known to the plaintiff.

2. We must remember in passing that in Oregon a mortgagee has no estate or title to realty but only a lien which is enforceable by foreclosure of his mortgage. It is laid down in Section 437 that, at his own election, a plaintiff may prosecute as a defendant a creditor having a lien on the property or any portion thereof. The section concludes with this language:

"When the lien is upon an undivided interest or estate of any of the parties, such lien, if a partition be made, is thenceforth a lien only upon the share assigned to such party; but such share shall be first charged with its just proportion of the costs of the partition, in preference to such lien."

Section 442 is here set down in full:

"If it be alleged in the complaint and established by evidence, or if it appear by the evidence, without such allegation in the complaint, to the satisfaction of the court, that the property or any part of it is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise, upon the requisite proofs being made, it shall decree a partition according to the respective rights of the parties, as ascertained by the court, and appoint three referees therefor, and shall designate the portion to remain undivided for the owners whose interests remain unknown or not ascertained."

Thus far it is plain that the normal result of a suit in partition is to divide the property as it stands, making the liens upon hitherto undivided portions a charge thereafter only upon tracts designated as the property of the lien debtors. Such a conclusion is the rule. A sale of the property is the exception.

It remains to be seen by an examination of the statute whether the result, as to a mortgage lien, is changed by the subsequent sections of the enactment. It is true that by Section 440 a lien creditor defendant is required to declare in his answer how his lien is created, the amount of the debt secured thereby and remaining due and whether such debt is secured in any other way, and if so, the nature of such other security. The reason for the requirement respecting the nature of the other security is found in Section 457, which gives the court the power to require such a lien creditor to marshal his securities, exhausting other assurances for the payment of his debt before attacking the undivided interest in the land which is made the subject of partition. The reason for calling upon the lien creditor to declare the amount of his lien is that under Section 437 the court may declare the amount of the lien which thenceforward attaches to the portion of the land set apart to the lien debtor. By Section 444 a decree confirming a partition is binding and conclusive on parties who have an interest in the estate as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or inheritance of such property or any part thereof after the termination of a particular estate therein, etc. This category does not include mortgage lienholders, for, as already pointed out, such persons have no estate in the realty sought to be partitioned. Indeed, Section 445 expressly declares that the decree and partition shall not

affect any person except such as are specified in the preceding section. Section 447 provides that if the court is satisfied from the report of the referee that the property or any separate part thereof is so situated that a partition cannot be made without great prejudice to the owner, it then can make a decree directing the referees to sell the same or any part thereof. In that event, as required by Section 449, before making the order of sale, if lien creditors, other than those by judgment or decree, have not been made parties, they must be made defendants on motion of either of the original parties. By the following section the plaintiff may produce the certificate of the county clerk, showing unsatisfied liens by judgment or decree affecting the property, or any part thereof, and unless this certificate is furnished the court may appoint a referee to ascertain the amount and priority of such judgment liens. Notice to such creditors may be served and a procedure is prescribed to be observed before the referee in ascertaining the amount of such liens as arise from judgment or decree. Manifestly, this procedure does not include more than the liens of the latter class and excludes the consideration of liens by mortgages.

We note that under Section 456:

"The proceeds of the sale of the encumbered property shall be distributed by the decree of the court, as follows:—

"1. To pay its just proportion of the general costs of the suit;

"2. To pay the costs of the reference;

"3. To satisfy the several liens, in their order of priority, by payment of the sums due, and to become due, according to the decree;

"4. The residue among the owners of the property sold, according to their respective shares."

In our judgment, the liens mentioned in the order of distribution refer to those already adjudicated by a judgment or decree. It is provided in Section 458 that the proceedings to ascertain the amount of the liens, as already stated, shall not delay the sale nor affect any other party whose rights are not involved in such proceedings. It is said in Section 461:

"All sales of real property made by the referees shall be made by public auction to the highest bidder, in the manner required for the sale of real property on execution. The notice shall state the terms of sale, and if the property or any part of it is to be sold subject to a prior estate, charge, or lien, that shall be stated in the notice."

A sale may be made on credit: Section 462. Securities may be taken by the referee for the payment of the purchase price: Section 463.

3. Reading together, as we must, Section 437, making the lien of a creditor on an individed portion a lien upon the severed portion thereafter, and Section 461, requiring notice to be given that the estate is sold subject to a lien, we conclude that all that can be done in a suit or partition respecting a mortgage lien is to attach it to the partitioned portion of the property to which it belongs. If it is to be foreclosed in the partition suit there would be no reason for announcing to the purchaser that the land it affects will be sold subject to its lien; for the very purpose and scope of a foreclosure sale is to divest the property from the lien and pass it unencumbered to a purchaser. The partition statute is utterly silent respecting the enforcement of a mortgage lien. The whole purpose and intent of the partition procedure is to adjust rather than to enforce the rights of the parties. The reason for the distinction made in the statute between liens by judgment or decree and other liens is that the amounts of the former have already been adjudicated,

the issues have been determined and nothing remains to be done except to enforce the decree. The ministerial act of the county clerk in certifying to their existence is sufficient to ensure their liquidation out of the proceeds of sale. On the other hand, the validity of and the amount due on a mortgage are yet to be determined. More than that, there is a wide difference between declaring and establishing a right of a party respecting a tract of land and the enforcement of that right. It is true the Ukase Investment Company as defendant in the partition suit asks for a sale of the property; but the reason it gives is that the realty cannot be divided without prejudice to the owners. Moreover, the complaint there states that the company is the owner in its own right of one third of the land and in that character it may urge the sale instead of division of the tract. It also prays that the share of Smith in the proceeds of sale be applied towards satisfaction of any judgment it may thereafter obtain against him in the foreclosure suit; but this falls far short of seeking foreclosure in the partition proceeding. It only means that if the company becomes a judgment creditor, as it may by final decree in foreclosure, it can share as such, in the distribution prescribed in Section 456. This is quite consistent with the sale in partition of Smith's part subject to the mortgage as authorized by Section 461. In other words, in its character as a judgment creditor the company would be entitled to its distributive share of whatever Smith's share would bring subject to the mortgage, and besides, as mortgagee might sell on foreclosure as against the purchaser for the balance of the debt remaining unpaid.

4. We come then to the question, already stated, whether this mortgage foreclosure suit can be main-

tained while the partition suit is yet undetermined. In other words, Will the partition suit abate the foreclosure suit? The matter is thus treated in 1 C. J. 72:

"As has also been stated, one of the generally recognized tests of the identity of causes of action is this: Is full and adequate relief obtainable in the prior suit? If it is, then the second suit is unnecessary and vexatious and should abate; but it is otherwise if the whole relief sought in the second suit is not obtainable in the first. If the relief which may be given or the remedies available in the second suit are more extensive than can be attained in the first, a plea to the second suit of the pendency of the first is not good. The rule in equity is the same as at law, that the plea of a prior suit pending can be pleaded when, and only when, all the relief sought in the second action is obtainable in the first."

5. The principle seems to be that *lis pendens* is not a good plea unless the judgment in the first action would bar a judgment in the second: *Foster* v. *Napier,* 73 Ala. 595; *Dick* v. *Gilmer,* 4 La. Ann. 520; *Martin* v. *Splivalo,* 69 Cal. 611 (11 Pac. 484); *Gilpin* v. *Carroll,* 92 Md. 44 (47 Atl. 1021). The rule is otherwise stated thus: If more relief can be had in the second suit than in the first, the latter will not support a plea in abatement of the former: *Larter* v. *Canfield,* 59 N. J. Eq. 461 (45 Atl. 616); *Jordan* v. *Underhill,* 91 App. Div. 124 (86 N. Y. Supp. 620); *Reis* v. *Applebaum,* 170 Mich. 506 (136 N. W. 393); *Griffing* v. *Griffing Iron Co.,* 61 N. J. Eq. 269 (48 Atl. 910); *Carr* v. *Lyle,* 126 Mich. 655 (86 N. W. 145). Or, as stated in *Way* v. *Bragaw,* 16 N. J. Eq. 217 (84 Am. Dec. 149):

"To abate the second suit, the remedy in the first must be coextensive, and equally beneficial to the complainant."

Recurring to the provisions of Chapter 5 of Title VI we find that a lien upon real property, other than that

of a judgment or decree, shall be foreclosed and the property adjudged to be sold to satisfy the debt secured thereby by a suit. In such a proceeding the lien creditor may recover a personal decree against the debtor, which, under certain circumstances, may be satisfied out of other property belonging to the debtor. No provision for such relief is authorized by the partition procedure. In foreclosure a sale for the satisfaction of the decree may be compelled at the suit of the plaintiff and it is for cash, subject, of course, to the right of redemption as upon sale by execution. Whether a sale shall be made at all and if made the terms thereof are subject to the discretion of the court in a partition suit with the restriction that the court cannot order a sale unless it shall be made to appear that actual partition of the land cannot be made without detriment to the owners. Under such circumstances the mortgagee is not bound to surrender his remedy by foreclosure at the option of any tenant in common who desires to partition the land and much less if the latter also happens to be the mortgagor. When the latter gave the mortgage it was subject to the provisions of the statute respecting the foreclosure coupled with a personal judgment against himself. He cannot circumscribe or hinder this right of the mortgagee by mere election to make him a party defendant in a partition suit. In brief, the established procedure for foreclosure affords greater and more efficient relief to the creditor than he can obtain in a partition suit, the primary object of which is to adjust rather than to enforce the rights of the parties. For this reason, if for no other, the foreclosure is not to be abated by the partition. The decree of the Circuit Court is affirmed. AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Submitted on brief for appellant and argued in behalf of respondent April 24, affirmed May 27, 1919.

MISHLER *v.* EDMUNSON.*

(180 Pac. 934.)

Replevin—Defendant's Redelivery Bond—Construction—Costs.

1. Redelivery bond of defendant in replevin action conditioned "for the payment to said plaintiff of any such sum as may, for any cause, be recovered against said defendant," *held* to obligate sureties to pay costs taxed against defendant in the trial court and also on his appeal.

Replevin—Redelivery Bond—Release of Surety—Execution of Supersedeas Bond.

2. The execution of a *supersedeas* bond by defendant in replevin action on appeal from judgment for plaintiff does not operate to release sureties upon his redelivery bond.

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 2.

On November 5, 1914, the plaintiff commenced an action in replevin in the Circuit Court of Lane County against J. M. Edmunson and B. A. Allen for the recovery of 184 bales of hops and duly filed his affidavit, bond and order requiring the sheriff to take possession of the hops and deliver them to the plaintiff. While the sheriff held possession of the hops the defendants duly executed a counter-bond for the redelivery of the hops to the defendant J. M. Edmunson, reciting that:

"We are firmly bound, jointly and severally, in the sum of $7,000, being double the value of said property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery thereof be adjudged or for the payment to said plaintiff of any such sum as may, for any cause, be recovered against said defendant."

*For authorities passing on the question of elements of damage and costs recoverable in action on replevin bond, see note in 30 L. R. A. (N. S.) 373. REPORTER.

The hops were delivered to J. M. Edmunson. A trial was had and judgment was entered in favor of the plaintiff against the defendants to the effect that the plaintiff was "the owner and entitled to the immediate possession of said property, being the property hereinbefore described, and further decreeing that in case said personal property hereinbefore mentioned could not be delivered to the plaintiff that the plaintiff be given a judgment against the defendant, J. M. Edmunson, for the sum of $1,346.69 and the costs of said action," and judgment against the said defendant, J. M. Edmunson, and in favor of the plaintiff was thereupon entered for the sum of $1,346.69 and $74.60 costs, on June 15, 1915. From this judgment the defendant J. M. Edmunson appealed to this court, where it was affirmed on May 1, 1917: *Mishler* v. *Edmunson,* 84 Or. 555 (164 Pac. 718). Based upon a mandate of this court, judgment was again entered in the Circuit Court of Lane County on July 24, 1917, in favor of the plaintiff and against J. M. Edmunson and his sureties on the *supersedeas* bond which they executed upon the appeal to this court, for the principal amount and costs in the lower court and for $39 costs in this court.

Execution was issued on the judgment rendered against J. M. Edmunson and his sureties on appeal and was returned by the sheriff wholly unsatisfied. No part of the judgment has been paid and the plaintiff commenced this action against the defendants J. M. Edmunson, M. J. Edmunson and M. S. Wallis to recover the full amount of the judgment and all costs upon the redelivery bond which was executed by the defendants M. J. Edmunson and M. S. Wallis on November 6, 1914, by reason of which the sheriff delivered the hops in controversy to the defendant J. M. Edmunson. It is contended that the defendants M. J.

Edmunson and M. S. Wallis as sureties are liable to the plaintiff upon the redelivery bond for the full amount of the judgment which he recovered against J. M. Edmunson, with interest thereon from the date of the judgment at 6 per cent per annum, and for the costs in the Circuit Court and this court.

A jury was waived and trial was had before the Circuit Court, which made findings of fact and conclusions of law upon which it rendered judgment in favor of the plaintiff and against all of the defendants for the full amount of plaintiff's claim with costs and interest thereon at 6 per cent per annum from October 16, 1917, the date of the judgment. The defendant M. S. Wallis only appeals, contending that because by the mandate of this court a judgment was rendered against the sureties on the *supersedeas* bond he was thereby released and discharged from any liability upon the replevin bond; that there is nothing in the record to show that the hops could not be delivered or that any effort was made by the plaintiff to secure them after the final judgment, and that judgment should not have been rendered for the amount of costs in the Supreme Court.

The vital question is: When the defendant in a replevin action executes a redelivery bond with surety and obtains the property and the plaintiff recovers judgment in the action for its possession or value and the defendant appeals to the Supreme Court, executing a *supersedeas* bond, and through the mandate of this court judgment is entered against the defendant and his sureties on the *supersedeas* bond for the value of the property, is the surety on the replevin bond discharged and released from all liability? AFFIRMED.

For appellant there was a brief prepared and submitted by *Mr. A. C. Woodcock.*

For respondent there was a brief and an oral argument by *Mr. O. H. Foster.*

JOHNS, J.—The bond is joint and several, follows the statute and expressly provides for the delivery of the hops to the plaintiff, "if such delivery thereof be adjudged, or for the payment to said plaintiff of any such sum as may for any cause be recovered against said defendant." Judgment was recovered against J. M. Edmunson, the defendant in the original action, for the sum of $1,346.69, the value of the property, and $74.60 costs in the trial court. From this judgment the defendant J. M. Edmunson appealed to this court, where it was affirmed with costs in this court, $39.

1. We are of the opinion that all of the costs in both courts come within the terms and provisions of the redelivery bond. It was through the force and effect of that counter-bond that the property was taken from the sheriff and delivered to the defendant J. M. Edmunson in an action then pending. At the time of its execution his sureties knew that the case could and might be appealed to the Supreme Court. And regardless of the *supersedeas* bond they also knew that as long as the redelivery bond was in force and effect the defendant J. M. Edmunson was entitled to obtain and hold possession of the hops.

The law is well stated in 34 Cyc. 1582, where it is said:

"One who becomes surety on a replevin bond thereby becomes a joint debtor with the principal obligor, and ordinarily his undertaking extends to all proceedings and adjudications in the same action, through every court to which it may be carried by appeal, in case the party giving the undertaking is finally defeated."

We find in 23 R. C. L., page 919:

"So also the costs in the replevin suit are recoverable by the successful defendant suing on the replevin bond, when the condition is that the obligors will pay to the obligee any judgment he might recover in the replevin action."

Coonradt v. *Campbell,* 29 Kan. 391, is a similar case and it was there held:

"The appeal bond continued in force from the time it was given until the property was restored under the final judgment. The *supersedeas* bond was only additional security, having in no manner set aside the obligations of the appeal bond. It was entirely optional with Coonradt whether he took the judgment against him in the District Court up to this for review, and entirely optional whether if he did take it up he should stay the enforcement of that judgment by a *supersedeas.* His election to continue the litigation further and to stay proceedings in no manner released him from the liabilities assumed by this appeal bond."

The same principle is sustained in *State* v. *McGlothlin,* 61 Iowa, 312 (16 N. W. 137); *Campbell* v. *Laue,* 2 Neb. (Unof.) 63 (95 N. W. 1043); *Shannon* v. *Dodge,* 18 Colo. 164 (32 Pac. 61); *Jordan* v. *Agawam Woolen Co.,* 106 Mass. 571.

The only authority cited by defendant's counsel is *Winston & Fenwick* v. *Rives,* 4 Stew. & P. (Ala.) 269. That case was first tried in the County Court and an appeal was taken to the Circuit Court. A *supersedeas* bond was executed on that appeal and the judgment of the County Court was affirmed. An appeal was then taken to the Supreme Court and another *supersedeas* bond was executed on that appeal. Judgment was rendered against the sureties on the final appeal and it was there held that the judgment against the sureties on the *supersedeas* bond on the appeal from the Circuit to the Supreme Court operated as a release

or discharge of the sureties on the *supersedeas* bond on the appeal from the County Court to the Circuit Court. That case is not in point here.

2. We hold that the *supersedeas* bond is cumulative; that the terms and provisions of the redelivery bond, "for the payment to said plaintiff of any such sum as may, for any cause, be recovered against said defendant," are broad enough to cover and include costs in the trial court and the costs on appeal to this court, and that the execution of the *supersedeas* bond did not operate to release the defendant M. S. Wallis from liability upon the redelivery bond. The judgment of the Circuit Court is affirmed. AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued March 12, affirmed in part and modified in part April 8, rehearing denied May 27, 1919.

OGILVIE *v.* STACKLAND.

(179 Pac. 669.)

Boundaries—Mutual Agreement.

1. Where boundary lines are settled by mutual agreement or acquiescence for more than thirty years and marked by fences or other monuments, they become the true boundary lines.

Boundaries—Establishment—Survey.

2. When a boundary line has been accepted as marked and has been occupied by the respective owners for more than thirty years, such line cannot be considered as doubtful, uncertain, or disputed, so as to authorize proceedings by the county surveyor to establish a different division line under Section 2991, L. O. L.

Covenants—Vendor and Purchaser—Warranty—Quantity.

3. Where sale is for a gross sum and not by the acre, and the acreage stated in the conveyance is qualified by the words "more or less," there is no warranty of the exact quantity.

Covenants—Warranty—Breach—Shortage in Acreage.

4. A shortage of one sixth of an acre in 100-acre farm sold would not be a breach of warranty as to quantity.

Appeal and Error—Bill of Exceptions—Necessity.

5. That findings in regard to witness fees do not support the judgment for costs and disbursements under Section 570, L. O. L., is an error of law apparent from the face of the record, reviewable in absence of a bill of exceptions.

Witnesses—Fees—Attendance Outside of County.

6. Since, under Section 3145, L. O. L., a witness in Multnomah County is allowed mileage of only five cents per mile, a witness summoned to attend from another county, whose residence is more than 100 miles from the place of trial, is entitled to the double mileage given by Section 818, calculated on the basis of five cents only.

Appeal and Error—Objections Below—Assignment of Error—Costs.

7. The question of excessive allowance for witnesses' mileage is raised by objection to the allowance of any fees for the witnesses named and assignment as error of the judgment for any amount for such items; the greater including the less.

From Multnomah: DALTON BIGGS, Judge.

Department 2.

This is an action for damages for the breach of a covenant of warranty in a deed. The cause was tried by the court without the intervention of a jury. Findings of fact and conclusions of law were made and a judgment was rendered in favor of the defendants. Plaintiff appeals.

The facts involved in this case are substantially as follows: On July 28, 1908, defendants conveyed to plaintiff by deed, with the usual covenant of warranty, real property in Union County, Oregon, described as follows: northwest quarter of southwest quarter, section 23, and northeast quarter of southeast quarter section 22, township 3 south, range 40 east of Willamette meridian, except one fifth of an acre used as a county road.

Also commencing at the southeast corner of the southwest quarter of northeast quarter of section 22, township 3 south, range 40 east of Willamette meridian; thence north 20 rods; thence east 32 rods; thence north 2 rods; thence east 12 rods; thence south 2 rods;

thence east 116 rods; thence south 20 rods and thence west 160 rods to the place of beginning, said last tract containing 20 acres more or less.

Karl J. Stackland, a brother of defendant, is the owner of the land lying west and north of the 20-acre tract owned by plaintiff, and Mrs. Duncan is the owner of the northwest quarter of the southeast quarter of the said section 22, lying west of the remainder of the tract purchased. More than thirty years ago a division line fence was built extending north and south through the southeast quarter of section 22, and continued on north through the northeast quarter of said section. This fence was built on the subdivision line as established by the government survey and remained there until changed by plaintiff. Before the purchase was completed plaintiff went upon and examined the tract of land which was then a cultivated farm inclosed by fences including the line fence above mentioned. The tract of land so purchased and the boundary line fences were pointed out to him. About five years thereafter, plaintiff conceived the idea that the 40-acre subdivision line of the section which was the west boundary of his land diverged from the line of the division fence, commencing at the south end of the line and branching west to about 23 feet at the north end. He employed the county surveyor to establish this line in controversy between his land on the east and that of Mrs. Duncan and Karl J. Stackland on the west. The county surveyor, after giving some notices, with the assistance of plaintiff surveyed this line and plaintiff moved the old line fence over to the west without objection of the owner, extending north until he reached the land owned by Karl J. Stackland and attempted to continue his new fence across Karl J. Stackland's land taking in a strip

about 23 feet wide for a distance of 20 rods along the west end of the 20-acre tract, but when he came to the line of Karl J. Stackland's land, the latter would not allow him to move the old division line fence. Thereupon plaintiff commenced an action in the Circuit Court for Union County against Karl J. Stackland to eject him from this strip of land. A judgment was entered in that case on November 17, 1913, in favor of Karl J. Stackland, and against this plaintiff, to the effect that plaintiff had no right to the strip of land. The findings and judgment are founded upon the proof to the effect that the true line was as marked by the old division fence. The land in controversy consists of about one sixth of an acre and the testimony showed it to be of the value of from $5 to $10. Plaintiff afterwards commenced this action in Multnomah County to recover damages for the alleged value of this strip of land together with his costs and expenses of the litigation in Union County.

It developed upon the trial of the present case that the sale and purchase was one in gross without regard to the price per acre and that the actual measurements showed that the land in possession of plaintiff between the line fences in existence when he purchased the land and which still remain is not deficient in amount but measures a little more than the 100 acres purchased, there being an excess in the section; that the surveyor did not make a division of the section into equal parts, but established a new line about 23 feet distant from the old line fence. The plaintiff failed to establish that the true division line between these different tracts was other than as marked by the old line fence. The trial court found among other things that the old line

fence was the true division line between the respective tracts of land.

AFFIRMED IN PART. MODIFIED IN PART.

For appellant there was a brief over the names of *Mr. C. A. Appelgren, Mr. Lewis Z. Terrall* and *Mr. George J. Cameron,* with an oral argument by *Mr. Appelgren.*

For respondents there was a brief over the names of *Mr. Conrad P. Olson, Mr. Leroy Lomax* and *Mr. James R. Bain,* with an oral argument by *Mr. Olson.*

BEAN, J.—The question in dispute involves the location of the subdivision line between the southeast quarter of the northeast quarter, and the southwest quarter of the northeast quarter of section twenty-two (22), township three (3) south, range 40 east, W. M. in so far as it borders on the west of the twenty acre tract described.

Defendant pleaded, to the effect, that this line was surveyed, located and established more than thirty years prior to the time defendants sold and conveyed to the plaintiff the lands mentioned and described in plaintiff's complaint herein; and that a line fence of rails was built and constructed on the division line so surveyed, located and established between the two tracts of land and was at the time defendants sold and conveyed the lands to the plaintiff, and had been continuously for more than thirty years immediately prior thereto, maintained and standing upon the division line between the two tracts of land and that the line fence did then, ever since has, and does still stand upon the division line and marks the west boundary of the lands conveyed by defendants to plaintiff. And that defendants sold the

tract to plaintiff with reference to such line; that the line as marked by the old rail fence had been recognized by the owners of the respective tracts on each side thereof as the true division line for more than thirty years. A careful reading of the testimony discloses that there was proof to sustain the allegations of defendant's answer.

Plaintiff moved to strike out that portion of the answer referred to and upon the motion being denied demurred to the same and assigns the overruling of the motion and demurrer as errors. Plaintiff also assigns error in the finding of the court to the purport that the old rail fence marked the true west line of plaintiff's tract of land, for the reason that such finding is not supported by the evidence. The same question is involved in each assignment of error.

1. Where the boundary lines of a tract of land are settled and determined by the mutual agreement or acquiescence of adjacent proprietors for more than thirty years and marked by fences or other monuments they became the true boundary lines: *McCully* v. *Heaverne,* 82 Or. 650 (160 Pac. 1166, 162 Pac. 863).

2. Plaintiff complains that the court ignored the survey of the county surveyor made in 1915. When a boundary line between two tracts of land has been accepted as marked and has been occupied by the respective owners for more than thirty years such line cannot be considered as doubtful, uncertain or disputed, so as to authorize proceedings by the county surveyor to establish a different division line under Section 2991, L. O. L. The Circuit Court was right in not allowing the old established line to be changed by a slight difference in a survey made by the county surveyor at the instance of the plaintiff: *Egan* v. *Finney,* 42 Or. 599 (72 Pac. 133). There was no

error in denying the motion to strike and overruling the demurrer.

3, 4. There is another reason why the judgment of the lower court should be affirmed. It is admitted in this case that the sale of the land to defendants was for a sum in gross and not by the acre. The quantity stated in the conveyance was qualified by the words "more or less." Therefore, there was no warranty of the exact quantity. There being no allegation of fraud in the transaction, if it be assumed that there was one sixth of an acre less than 100 acres in the area, it would not be a breach of the warranty. It appears, however, that there is no shortage in the 100-acre tract: *Britt* v. *Marks*, 20 Or. 223 (25 Pac. 636); 2 Sutherland on Damages, 250; 39 Cyc. 1312–1322. The other errors in regard to the land become unimportant. The main judgment of the lower court is affirmed.

APPEAL FROM JUDGMENT FOR COSTS.

5, 6. Plaintiff objected to certain items in defendants' cost bill. The trial court made finding of facts in regard thereto and rendered judgment in favor of defendants. Plaintiff also appeals from that part of the judgment and predicates error of the court in allowing defendants judgment for either fees or mileage for four witnesses. The gist of the findings of the court in this matter is as follows:

D. Lloyd, 3 days, 628 miles	$131.60
C. M. Stackland, 3 days, 628 miles	131.60
C. L. Keller, 3 days, 632 miles	132.40
Karl Stackland, 3 days, 628 miles	68.80

The court found that the three first-named witnesses attended by order of the court from Union County, Oregon, and more than 100 miles from the place of trial, and allowed double mileage, or twenty cents per mile for each; and that Karl J. Stackland

received a subpoena in that county, and attended as a witness upon the trial and allowed ten cents per mile for this witness.

In the absence of any statement in the bill of exceptions in regard to the amount of disbursements complained of, we take the finding of facts of the Circuit Court as correct. An appeal is permitted from the judgment on the allowance and taxation of costs and disbursements on questions of law only. Such a finding is final and conclusive as to all questions of fact. Not so, however, as to questions of law: Section 570, L. O. L.; *School District No. 30* v. *Alameda Constr. Co.*, 87 Or. 132, 142 (169 Pac. 507 788). The findings in regard to witness fees do not support the judgment. The fees of a witness in the Circuit Court for Multnomah County allowed by law are for each day's attendance, $2.00 (Section 3148, L. O. L., as amended by Laws of Oregon 1915, p. 86), and mileage at the rate of five cents per mile: Section 3145, L. O. L. A witness required to attend a trial in a civil action in a court of record in a county other than the one in which he resided, or is served with a subpoena and order, and more than 100 miles from his place of residence is entitled to double mileage and *per diem:* Section 818, L. O. L., as amended by Laws of 1915, p. 95; *Burrows* v. *Balfour*, 39 Or. 488 (65 Pac. 1062); *City of Seaside* v. *Oregon S. & C. Co.*, 87 Or. 624 (171 Pac. 396). Taxed by this law, defendants should be allowed costs and disbursements as follows:

Clerk's fee	$ 5.50
Attorney's fee (statutory)	10.00
Court reporter	10.00
D. Lloyd, 3 days, @ $4.00–628 miles @.10	74.80
C. M. Stackland, 3 days, @ $4.00–628 miles @ .10	74.80
C. L. Keller, 3 days, @ $4.00–632 miles @ .10	75.20
Karl Stackland, 3 days, @ $2.00–628 miles @ .05	37.40
Total	$237.70

7. It is contended by defendants' counsel that the assignment of error and objections to the cost bill are insufficient to raise the question presented. Plaintiff objected to the allowance of any fees for the witnesses named and assigns as error the judgment for any amount therefor. As the greater includes the less, and error is apparent from the face of the record of the judgment for costs, we think the appeal from the judgment for cost is well taken: *School District No. 30* v. *Alameda Constr. Co.*, 87 Or. 132, 142, 143 (169 Pac. 507, 788).

The judgment for costs will be modified in accordance herewith.

AFFIRMED IN PART. MODIFIED IN PART. REHEARING DENIED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued April 16, affirmed May 27, 1919.

PUFFER *v.* BADLEY.

(181 Pac. 1.)

Brokers—Compensation—Agreement—Statute of Frauds.

1. Section 808, L. O. L., as amended by Laws of 1917, page 786, declaring an agreement employing a broker to buy or sell real estate for compensation to be invalid unless in writing and subscribed by the party to be charged or his agent, describing the land and stating the commission to be paid, is satisfied by a written agreement so executed after the performance of the services.

Brokers—Employment—Contract Evidence of Agency—Admissibility.

2. A written agreement, to pay a broker a stated compensation for selling real estate, satisfying the statute of frauds and purporting on its face to have been made after the sale, was properly admitted in evidence to show the relationship of principal and agent in a suit for money had and received by such broker.

Brokers—Employment—Evidence of Agency—Sufficiency.

3. In an action to recover money received by defendant as plaintiff's agent in selling real estate, based upon defendant's alleged

failure to disclose a true offer made by the purchaser for the land sold, evidence *held* sufficient to sustain finding that defendant was plaintiff's agent.

Brokers — Action to Recover Money Received — Evidence — Value of Considerations Received from Sale.

4. Evidence as to the market value of lots conveyed to plaintiff by defendant as part of the purchase price for land sold by plaintiff to another through defendant as agent is admissible in action to recover the sum received by defendant in payment for such lots as part of an original cash offer for plaintiff's land, not disclosed by defendant to plaintiff, to show that plaintiff did not act capriciously in repudiating the transaction.

Appeal and Error—Harmless Error—Trial Without a Jury—Admission of Incompetent Evidence.

5. In an action tried by a court without a jury, admission of irrelevant and incompetent testimony, objected to, is not prejudicial error, where no injury to the party objecting resulted therefrom.

Appeal and Error—Review—Conflicting Evidence.

6. Finding by the trial court is conclusive on appeal, where there was a sharp conflict in the evidence.

Attorney and Client—Notice to Attorney—Imputation to Principal.

7. Knowledge of an attorney, who was only acting for plaintiff in passing upon the sufficiency of title to several properties, that a purchaser of land from plaintiff through defendant, a broker, had made a certain offer for the land, and that some of the properties received by plaintiff in part payment for her land actually belonged to the defendant, does not charge the plaintiff with constructive knowledge, where such attorney in every other detail was attorney for the purchaser.

Brokers—Accounting by Broker—Tender—Sufficiency.

8. The fact that, when a principal tendered her broker a deed to lots conveyed to her by him, and demanded payment of money retained by such broker from the proceeds of land sold by him for her, she made no mention of furniture included with a lot conveyed to her does not invalidate the rescission, where the broker refused to rescind.

[As to amount of compensation of real estate broker where contract fails to fix rate, see note in **Ann. Cas. 1912A, 1267.**]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

This is an action for money had and received by the defendant for the use of the plaintiff. The complaint is in the usual form, and the answer is a general denial. Upon stipulation the case was tried by the

court without a jury. The evidence discloses the following facts: The plaintiff, a widow, was the owner of certain business property on Washington Street in Portland, upon which there was a mortgage for $13,000. The property was assessed at $31,200. Being in financial straits, she was trying to sell this property, and the defendant, learning this fact, informed J. R. Ellison of the fact, and the latter authorized defendant to offer plaintiff $10,000 in cash, and his residence property at the corner of 37th and Morrison Streets in Portland, which was valued at $5,000. Plaintiff insists that this offer was never disclosed to her, but that defendant told her that Ellison was willing to pay her $4,000 in cash and convey to her the residence property mentioned, and certain other lots, which in fact belonged to defendant. The latter offer was finally accepted by her, and when she conveyed her property to Ellison, she received the $4,000, in cash, less a commission of $750 which she paid to defendant, and some incidental expenses, and also received deeds to the properties already referred to. In one of the houses conveyed to her by defendant, there was some furniture which was included in the conveyance. Thereafter, discovering that defendant had received $6,000 of the original cash offer, in payment for the lots which he had deeded to her, and that he had not disclosed to her the offer as made by Ellison, plaintiff tendered him a deed to such property and made a demand for the $6,000, which was refused, and she brought this action. At the conclusion of the trial, the court made findings of fact, and entered a judgment in favor of plaintiff, from which defendant appeals. The further facts will be found in the opinion.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. A. G. Thompson.*

For respondent there was a brief over the names of *Mr. George W. Gearhart* and *Mr. H. H. Northup,* with an oral argument by *Mr. Gearhart.*

BENSON, J.—1. Our attention is first called to the fact that the court admitted in evidence, over defendant's objection, a written instrument which reads thus:

"For services rendered in the sale of my property located between 16th and 17th Street on Washington Street and more fully described as Number 531 on Alder Street and 528–528½ and 530 on Washington Street in the City of Portland, State of Oregon, I hereby agree to pay to O. V. Badley the agent who sold said property to one J. R. Ellison the sum of Seven Hundred and Fifty ($750.00) Dollars and I hereby order and direct Geo. W. Gearhart the attorney for J. R. Ellison to pay to O. V. Badley said sum of $750.00 when final settlement is made and Mr. Ellison's part of the agreement for the exchange of the properties is fulfilled, said contract being a part of this memorandum.

"CORA E. PUFFER.

"Received payment 8–25–1917.

"O. V. BADLEY."

This document was introduced by the plaintiff as evidence of the fiduciary relation existing between plaintiff and defendant in the transactions involved herein. Defendant argues that it is inadmissible for the reason that it does not satisfy the requirements of Section 808, L. O. L., as amended by Laws of 1917, page 786, which is the statute of frauds. The portions of this statute which are to be considered in this connection, are as follows:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law: * * 8. An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for a compensation or commission; provided, however, that if the note or memorandum of such agreement be in writing and subscribed by the party to be charged, or by his lawfully authorized agent, and contains a description of the property sufficient for identification, and authorizes or employs the agent or broker named therein to sell such property, and expresses with reasonable certainty the amount of the commission or compensation to be paid such agent or broker, such agreement of authorization or employment shall not be void for failure to state a consideration."

2. It is clear that the writing in question satisfies every requirement of the statute, including the signature of the defendant, but it is urged that the instrument discloses upon its face the fact that it was executed after the sale was made, and was not signed by the defendant until after the payment of the commission therein specified. We are of the opinion, however, that a written memorandum of the agreement executed after the performance of the services satisfies the demands of the statute just as effectively as if it were written and signed prior thereto, and in this view we are supported by the cases of *In re Balfour & Garrette,* 14 Cal. App. 261 (111 Pac. 615); *Carrington* v. *Smithers,* 26 Cal. App. 460 (147 Pac. 225); *Muir* v. *Kane,* 55 Wash. 131 (104 Pac. 153, 19 Ann. Cas. 1180; 26 L. R. A. (N. S.) 519); *Ide* v. *Stan-*

ton, 15 Vt. 684 (40 Am. Dec. 698). The writing in question was properly admitted in evidence, and very clearly tended to establish plaintiff's contention that the relation of principal and agent existed between herself and defendant in the transactions which are the subject matter of the controversy.

3. It was defendant's contention that he was at no time acting as the agent for plaintiff, but that throughout the entire negotiations he was representing Ellison only. In support of this theory he offered in evidence the deposition of R. W. Zimmerman, who at the time of taking the deposition, and at the time of trial, was with the American Expeditionary Force in France. By this evidence it was sought to establish that Zimmerman was a real estate broker acting independently of defendant, with whom plaintiff had "listed" her property for sale; that he, as her agent, had conducted the negotiations with defendant as the agent of Ellison; had communicated to her, by telephone, the full details of Ellison's original offer, which had been rejected by her; that before the bargaining was finally concluded, he was called into the public service, and left the conclusion of affairs entirely in the hands of Badley, the defendant.

This evidence was not excluded by the court, but was admitted "subject to the objection," the court evidently treating the case, so far as procedure is concerned, as if it were a suit in equity. However, the court at the same time announced that in weighing the evidence he should not consider the evidence tending to prove agency in Zimmerman, for the reason that if there were any such agency its proof rested in parol, and was incompetent, as violating the statute of frauds as prescribed in Section 808, L. O. L.

It may be—although it is not necessary for us to decide—that such parol evidence is admissible collaterally, to show the relationship of the parties, where the enforcement of the specific contract is not an issue, but, having all of the evidence before us, and giving it all of the effect to which it is entitled, the finding of the trial court that the defendant was the agent of plaintiff, is fully justified.

4, 5. Plaintiff introduced, over the objection of defendant, the testimony of B. D. Sigler as to the market value of the properties which were conveyed by defendant to plaintiff, and this ruling is assigned as error. Plaintiff concedes that under the pleadings, this evidence is not strictly relevant to the issues, but urges that it was relevant and competent for the purpose of showing that plaintiff did not act capriciously in repudiating the transaction of which she complains, but had a real grievance. For this purpose it was admissible, but even if it were otherwise, we are unable to discover wherein the defendant suffered any injury therefrom, since the final determination of the cause is based upon the fact that the relation of principal and agent existed between the parties, and that defendant, while acting as agent for plaintiff, failed to disclose to her the true offer made by Ellison for her property. In *Williams* v. *Burdick*, 63 Or. 41 (125 Pac. 844, 126 Pac. 603), we find this language:

"In an action tried by a court without a jury, the receipt of incompetent evidence, properly excepted to, is not prejudicial, unless injury has necessarily resulted."

6. It is also urged that plaintiff must fail by reason of the fact that she had both actual and constructive knowledge of Ellison's offer, and of the fact that some

of the properties belonged to defendant before the deal was finally consummated. Regarding actual knowledge, the defendant introduced evidence to the effect that Zimmerman, in a telephone conversation, informed Mrs. Puffer of Ellison's offer, and that she rejected it. This testimony is flatly contradicted by her, and the conflict is conclusively disposed of by the finding of the trial court.

7. The contention of defendant in reference to constructive knowledge is based upon the theory that George W. Gearhart was acting as legal adviser for plaintiff in the transaction, and that he had full knowledge of the facts. The record discloses that Gearhart was representing Ellison in the matter, while Mrs. Puffer was relying upon the services and advice of Judge H. H. Northup. Judge Northup at this time became ill, and asked Mr. Gearhart to act for him in passing upon the sufficiency of the title to the several properties, as disclosed by the several abstracts. This he did, and Mrs. Puffer accepted his assurance as to the title in the tracts of land. It is conceded by all that in every other detail, Mr. Gearhart was the attorney for Ellison. Therefore any knowledge which Gearhart may have had as to the Ellison offer, and the source of the real estate which was actually conveyed, cannot be imputed to the plaintiff, for:

"The rule that notice to an agent is notice to his principal is not applicable unless the notice has reference to business in which the agent is engaged under authority from the principal, and is pertinent to matters coming within that authority; and hence a principal is not affected with knowledge which the agent requires while not acting in the course of his employment, or which relates to matters not within the scope of his authority, unless the agent actually communicates his information to the principal": 2 C. J. 863.

8. It is further urged that when plaintiff tendered to defendant, a deed to the properties conveyed to her by him, and demanded payment of the money he had received therefor from Ellison, she made no mention of the furniture which was in the Firland house. In regard to this it may be said, that there is evidence to the effect that when she made her demand for a rescission, the defendant promptly announced that the transaction was a closed incident, and that he would not rescind. Under such circumstances, further details would have been futile, and not required.

We find no reversible error in the record, and the judgment is affirmed. AFFIRMED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Argued April 23, affirmed May 27, 1919.

GUNTLEY *v.* NORTHERN PAC. TERMINAL CO.

(181 Pac. 4.)

Appeal and Error — Review — Nonsuit — Direction of Verdict — Evidence.

1. Appellate court, in considering appeal where trial court's action in overruling motions for nonsuit and for a directed verdict is assigned as error, will assume that plaintiff's testimony is true.

Master and Servant — Injury to Employee — Contributory Negligence—Sufficiency of Evidence.

2. In warehouse employee's action for injuries from spike in box-car door placed alongside of warehouse, at foot of steps, with spike protruding toward steps, involving question of whether employee was contributorily negligent in failing to avoid the door, evidence *held* to sustain verdict for employee.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2.

The plaintiff alleges that the Northern Pacific Terminal Company is an Oregon corporation with

its principal office in Portland, engaged in the switching and transfer of cars and trains from spurs, switches, side-tracks and warehouses, to and upon different lines in the City of Portland, for profit, gain and hire; that the defendant American Can Company is a New Jersey corporation, authorized to do business in the State of Oregon and engaged in the manufacture of tin cans and containers, for which it employs agents, servants and laborers, and is conducted for profit; that about October 2, 1917, the plaintiff was employed by the defendant can company as a common laborer in and about Municipal Warehouse No. A, in the City of Portland, near the plant of that company, and that on the date mentioned the defendants placed "alongside of the south front of said warehouse at and near the said steps a boxcar door, and from said door there protruded a spike, being a forty-penny nail, from the said door on the outside, and plaintiff being compelled to pass down the said steps and by and alongside of said door, and while so passing his shoe of his right foot was caught and became fastened on said spike, thereby suddenly and violently throwing plaintiff to the ground and thereby seriously and permanently injuring plaintiff as hereinafter complained of." It is further averred that the defendants carelessly and negligently placed and left the door against the side of the warehouse, "near and at said steps and at and alongside of said walk and foot-passage and where said servants, employees and laborers were required to pass and travel along," and allowed and permitted "a spike as aforesaid to stick and protrude out from said door, and thereby and on account of said carelessness, recklessness and negligence plaintiff received" the injuries of which he complains. The plaintiff alleges that prior to his ac-

cident he had rejected the provisions of the "Workmen's Compensation Act" and his rejection was accepted by the can company and filed with the state Industrial Accident Commission.

The defendants filed separate answers, admitting their corporate character but denying that the plaintiff had rejected the "Workmen's Compensation Act" as alleged and traversing all other material allegations of the complaint. As a further and separate defense the defendants plead in effect, "that the pathway and steps along which plaintiff was passing were free of obstruction and that the injury received by the plaintiff, if any, was caused wholly and solely by the recklessness and negligence of the plaintiff himself, and was not caused in any degree by any recklessness or carelessness on the part" of either of the defendants.

The plaintiff replied to each answer, denying all new matter.

The case was tried before a jury, which returned a verdict for the plaintiff against both defendants, upon which judgment was entered and from which they appeal.

During the trial each defendant moved for a judgment of nonsuit and after the testimony was all taken, for a directed verdict, which motions were overruled. After judgment was entered each defendant moved for a new trial and those motions also were overruled. The defendants assign as error that there is insufficient evidence to justify the verdict and judgment; "that the said verdict and judgment are against the law, and with reference thereto it appears from the plaintiff's own evidence that the alleged injury to the plaintiff occurred in broad daylight, and that the car door and alleged spike on which plaintiff claims to

have been injured were plainly visible to anyone using his sense of sight; that there was ample room for plaintiff to pass and repass to avoid the same; that the same was not in the direct path on which plaintiff was going at the time of the injury, and that any person using reasonable prudence could pass and repass the place where the said door and the said spike were placed without coming in contact with the same''; and that the court erred in overruling the defendants' motions for nonsuit and for a directed verdict. No exceptions were taken to the charge of the trial court. AFFIRMED.

For appellants there was a brief over the names of *Mr. James G. Wilson, Messrs. Teal, Minor & Winfree* and *Mr. George B. Guthrie,* with an oral argument by *Mr. Wilson.*

For respondent there was a brief and an oral argument by *Mr. J. C. Simmons.*

JOHNS, J.—The question to be determined is whether or not the evidence is sufficient to sustain the verdict. It appears from the record that while employees of the terminal company were engaged in switching they found a car door lying on the track at a point near the steps of the warehouse which the plaintiff descended at the time he received his alleged injuries; that with the assistance of some employees of the can company they removed the door from the track and placed it against the wall of the warehouse at the foot of the steps; that large spikes protruded through and on the outside of the car door towards the steps; that in going from the office to the warehouse the plaintiff usually came down the

steps and took a path that ran over to the warehouse, and that on the morning in question, in going down those steps his foot came in contact with one of the spikes protruding from the car door, as the result of which he fell to the ground and sustained his injuries.

The accident happened about 7:05 A. M. on October 2, 1917, when the weather was clear. The testimony of numerous witnesses for the defense tended to show that the car door had been removed from the track and placed against the wall of the warehouse about ten or twelve days before the accident, from which it was contended that the plaintiff in the ordinary course of his work knew that the car door was there and should have seen the protruding spikes; that he had an unobstructed pathway and that therefore he was guilty of contributory negligence which would bar his recovery. It must be conceded that the evidence of such witnesses was positive and unqualified on that point.

The plaintiff testified as follows:

"Q. Had you noticed that door there prior to that morning?

"A. I never seen that door before. * *

"Q. The first time you saw this door was when you got hurt?

"A. When I got hurt was the first time I ever seen that door.

"Q. You didn't know how it got there, or anything about it, did you?

"A. No, sir. * *

"A. I sat there, and I was looking at that door, I looked up and I saw the hinges broken, and I looked down at the bottom and I seen that spike. That was the first time I noticed it. * *

"Q. Now, Mr. Guntley, isn't it a fact that that door had been there alongside of the warehouse since the 23d day of September, 1917?

"A. I never seen that door before, until that time. * *

"Q. And you hadn't noticed that door?

"I never seen that door anywhere, until I got hurt that morning. * *

"A. No; but in sitting there on those steps, waiting to be taken home, I was looking at that door, as I stated before. That is why I say—I claim that that door was pulled over on that platform about 14 inches. * *

"Q. And (you) came out there and sat again; that was the first time you ever knew there was a nail there?

"A. That was the first time I ever knew the nail was there."

Ben Paul, a witness for the plaintiff, testified thus:

"Q. Now, were you down at the warehouse on the first of October?

"A. Yes, sir.

"Q. What was done there on that day, the first day of October, and the day before Mr. Guntley got hurt, in reference to a boxcar door; what was done?

"A. Well, the door came off of the car, and that is all I know; so the morning before it was put up there, a fellow that was on the train—some railroad fellows—came up there, and asked Mr. Gunderson to help put the door up— * *

"Q. Well, then, what did you and Mr. Gunderson do, Mr. Paul?

"A. Well, we put up the door, and carried—the railroad fellows came in on the switch that morning, and the door laid across the track where there is a little switch that turned, and closed their switch, and they couldn't throw the switch on account of the door being there; and so these railroad fellows came up there and asked Mr. Gunderson if they could get anybody to help them, and I happened to be inside of the building, No. A, working, and he happened to see me, and he asked me to come and help him; so we picked up the door and set it up beside the building. * *

"Q. Was that the day before Mr. Guntley got hurt?

"A. It was a day or two before he got hurt. I couldn't remember just what day it was. Me and a couple of boys put it up, and I went back to my work.

"Q. Where did you get the door from?

"A. We got it across the track. * *

"Q. Then where did you put it, Mr. Paul, from this place?

"A. We carried it in and put it beside the building, right by the lower steps where you go up to the little office door. * *

"Q. And who assisted you in putting that door up there?

"A. Mr. Gunderson.

"Q. And who else?

"A. The railroad fellows.

"Q. The fellows that were with the engine?

"A. With the engine; yes, sir.

"Q. And Mr. Gunderson is with the American Can Company?

"A. Yes, sir.

"Q. And what position did he hold at that time?

"A. Well, he holds—he is superintendent, or something. I don't understand; but I know he hired me to go to work.

"Q. Some kind of an officer or foreman?

"A. Yes, sir. * *

"Q. Well, what did you see there?

"A. Well, I seen three spikes in the door.

"Q. And how far were they protruding out of the door, if any at all?

"A. Well, they were out from the door about two and one-half inches. * *

"Q. And how high from the ground was that spike that was bent toward the steps?

"A. Well, I judge it was about a couple of inches from the ground, or three, or something like that."

James Carsner testified for the plaintiff as follows:

"Q. I will ask you in going from this place to the American Can Company, is it traveled by the laborers

and the servants in that warehouse—whether or not this route down there to the American Can Company is traveled?

"A. Across the railroad? Yes, sir.

"Q. That is usually and customarily traveled?

"A. Yes, sir; it is the short cut through there.

"Q. And what would be the long cut?

"A. You would have to come out here, and come down these stairs and around back here, and go around by the crates and around by the factory. There are crates right there by the municipal scales."

1. The testimony of this witness tended to show that the door was removed from the track and placed against the warehouse the day before the accident. Assuming, as we must for the purpose of this opinion, that the testimony on the part of the plaintiff was true, it would show that the switching crew of the terminal company found the car door lying on the track in front of the engine and with the aid of Mr. Gunderson, the foreman of the can company, it was removed from the track and placed against the wall of the warehouse at the foot of the steps which were used by employees of the can company in going to and from the office to the warehouse, and that on the outside, projecting from the car door, were three or four large spikes pointing toward the steps; that the car door was removed from the track the day before the accident and was never seen by the plaintiff until the morning that he received his injuries and that he was injured in going down the steps in his customary manner, by coming in contact with one of the protruding spikes, without any knowledge of its presence there.

The spike in the car door was the proximate cause of the injuries and the door had been placed against the warehouse wall by the joint action of the employees of both defendants. While those employees

testified positively that it was placed there about ten days before the accident, the above testimony on the part of the plaintiff tends to show that it was so placed the day before the accident, and the plaintiff testified that he saw it for the first time on the morning of the accident.

Among others, the court gave the following instructions:

"The law requires a person to use his ordinary senses of sight and hearing for the protection of himself against injury.

"If you believe, from the evidence in this case, that the door in question was placed in a position so as to give ample room for passage alongside of it, and that a person paying ordinary attention to his walking would have noticed the same and avoided said door, then and in that event you are instructed that the defendants are not liable in this case, and the plaintiff cannot recover anything herein.

"If you believe, from the evidence, that the plaintiff at the time of the alleged injury, by which he claims to have been injured in this case, was rushing down the stairs, and not paying the attention to where he was going that an ordinarily prudent man would have, under the circumstances, and by reason of said fact the injury occurred, then and in that event you are instructed that the plaintiff was guilty of contributory negligence—negligence contributing to the injury, and, therefore, could not recover.

"It is indisputably shown in this case that the place where the plaintiff claims to have been injured was on premises belonging to the city of Portland, and not owned by the defendant, the Northern Pacific Terminal Company, or by the defendant, The American Can Company. There was no duty on the part of the defendant, Northern Pacific Terminal Company, or on the part of the defendant, The American Can Company, to keep said premises in a safe condition for the plaintiff, and the only duty owed by the defendant, Northern Pacific Terminal Company, and

the defendant, The American Can Company, was not wantonly to injure the plaintiff.

"Before a plaintiff can recover any sum whatever from a defendant, the defendant must have violated some duty which he owed to that plaintiff. If you find from the evidence, therefore, that the door in question was placed at the point in question by any employee of the Northern Pacific Terminal Company of Oregon, or by the American Can Company, but was not placed there wantonly or maliciously, then and in that event you are instructed that the plaintiff cannot recover in this case any verdict whatever against the defendant, Northern Pacific Terminal Company, or the defendant, The American Can Company.

"If you find from the evidence that the door in question, at the time of the alleged injury, was in a location where any ordinarily prudent person would have placed the same, under the circumstances, then there was no negligence on the part of the defendants, or their employees, in placing the same at said point, if you find they did so place the said door, and in that event your verdict should be in favor of the defendants."

2. Under this charge, favorable to the defendants, the jury found for the plaintiff. After a careful reading of the entire record we think that there was sufficient evidence to sustain the verdict. The judgment is affirmed. AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued March 27, reversed and dismissed May 27, 1919.

KIRCHOFF *v.* BERNSTEIN.

(181 Pac. 746.)

Attorney and Client—Special Trust—Fair Dealing.

1. The law requires that the conduct of an attorney, when dealing with his client, shall be characterized by fairness, honesty and good faith.

Attorney and Client—Dealings—Burden of Proof.

2. When a client challenges the fairness of a contract made with his attorney, the attorney has the burden of showing, not only that he used no undue influence, but also that he gave to his client all the information and advice which it would have been his duty to give, if he himself had not been interested, and that the transaction was as beneficial to the client as if the latter had dealt with a stranger.

Attorney and Client—Contracts for Compensation.

3. A client is ordinarily not entitled to relief from an agreement concerning compensation to be paid his attorney, unless he has suffered injury through an abuse of confidence on the part of the attorney.

[As to compensation of attorney, see note in Ann. Cas. 1916E, 249.]

Executors and Administrators—Attorney's Fees—Amount.

4. An attorney's fee of $3,500, allowed by the County Court for services rendered to executors of an estate worth $98,886, *held* reasonable.

Attorney and Client—Accounting—Evidence.

5. In an action for an accounting, by the administrator of a deceased beneficiary under another's will against attorneys who represented such beneficiary in procuring his share under the will, evidence *held* to show that defendants, in securing a compromise of a *bona fide* contest of the will, acted in good faith and in accordance with instructions from the beneficiary.

Attorney and Client—Accounting—Evidence.

6. In an action for an accounting, by an administrator of the estate of a beneficiary under another's will against attorneys who had represented such beneficiary in securing his share under the will, evidence *held* to show that the beneficiary was not deceived about defendants acting as attorneys for the executors of the will, as well as for such beneficiary.

Attorney and Client—Value of Services—Services to Beneficiary of Estate.

7. Where attorneys for a foreign beneficiary kept him informed of the proceedings in the estate, and appeared in and settled a *bona fide* con-

test of the will, and forwarded him his share, amounting to over $50,000, in an action by the beneficiary's administrator against such attorneys for an accounting, the contention that valuable services were not performed by defendants for the beneficiary individually, although they were also attorneys for the estate's executors, cannot be sustained, and for such services a fee of $3,500, which was approved by the beneficiary, was reasonable.

BENNETT, J., dissenting.

From Multnomah: GEORGE R. BAGLEY, Judge.

In Banc.

Daniel Kunkel died on January 17, 1914. He left an estate consisting of real and personal property of the aggregate value of $98,886.08. The real property embraced three lots located in Portland. Two of these lots were worth $25,000 and the third lot was valued at $4,500. The personal property included cash in bank amounting to $41,265.28, a secured promissory note which was worth $27,500, its face value, and other items amounting to $620.80.

Daniel Kunkel executed a will on December 2, 1912, by the terms of which he named Edward Schiller and Peter Wagner as executors; he devised one third of his real property to his wife Anna Kunkel; and the remainder of his estate he gave to his brother Samuel Kunkel who resided in Germany. On January 21, 1914, a petition was filed in the County Court of Multnomah County for the probate of the will and on January 24th, the court admitted it to probate. The defendants Alexander Bernstein and D. Solis Cohen, copartners as Bernstein & Cohen, became the attorneys for the executors.

Alexander Bernstein had for more than twenty years acted as attorney for Daniel Kunkel. During this period Bernstein drew several wills for him, including the one which was admitted to probate. When Bernstein prepared the will of December 2d,

Daniel Kunkel gave him the address of his brother and requested Bernstein, in case of his death, to communicate to his brother, Samuel Kunkel, the fact of his death and the fact that the will named Samuel Kunkel as a beneficiary. In compliance with the request of Daniel Kunkel the defendants, on January 17, 1914, addressed a letter to Samuel Kunkel, informing him of the death of his brother and that he was named in the will as one of the beneficiaries. The letter explained that the defendants were conveying this information in conformity with a request made by Daniel Kunkel at the time of the execution of the will. Inclosed with the letter was an instrument which the defendants had prepared for the purpose of enabling Samuel Kunkel to appoint Alexander Bernstein as his attorney in fact. After referring to this instrument, the defendants, in their letter, requested Samuel Kunkel to execute the power of attorney and to secure the acknowledgment of the nearest American consul if he desired Alexander Bernstein to act as his attorney in fact. Under date of February 5, 1914, Samuel Kunkel acknowledged receipt of the letter of January 17th and a few days afterwards he forwarded the power of attorney to the defendants who received it on or about March 3d.

On August 5, 1914, Anna Kunkel commenced a contest against the will. Negotiations for a compromise of the contest resulted in a settlement under the terms of which Anna Kunkel received all the real property freed from encumbrances and all claims whatsoever and the sum of $1,500 for her attorneys; and the remainder of the estate, less taxes and expenses of administration, became the property of Samuel Kunkel.

The contest having been disposed of, the County Court, on November 18, 1914, approved the final ac-

count of the executors, including an item of $3,500 allowed as compensation for services rendered to the executors by their attorneys, the defendants. After paying all the claims against the estate, taxes and the expense of administration, there remained for Samuel Kunkel as his share of the estate, the sum of $27,589.02 in cash and also a secured promissory note for $27,500; and hence the aggregate value of his portion of the estate then remaining was $55,089.02 plus whatever interest may have been due on the note. Besides this aggregate amount of $55,089.02 distributed at the close of the administration of the estate the sum of $1,000 had been sent to Samuel Kunkel on May 7th, and consequently his portion of the estate amounted to $56,089.02.

When Anna Kunkel commenced the proceeding to contest the will, Frank C. Hesse, an attorney who had studied in Germany and possessed a thorough and accurate knowledge of the German language, was retained to assist the defendants. On November 19, 1914, the defendants wrote to Samuel Kunkel telling him that the final account of the executors had been approved and that Alexander Bernstein had received from the executors for Samuel Kunkel the sum of $27,589.02 in cash. This letter also informed Samuel Kunkel that "for the professional services of Messrs. Bernstein & Cohen which have been rendered for you to date" the defendants charged $3,500 and that "for Mr. Hesse's services" Alexander Bernstein had paid $1,000, leaving $20,089.02 in the hands of Alexander Bernstein, after deducting the further sum of $3,000, which the defendants remitted by means of a draft accompanying this letter. In explanation of the fact that only $3,000 was at this time remitted it is proper to say that in response to a letter written by the de-

fendants on October 1st, asking Samuel Kunkel to say "in what manner and how" he wished his money sent to him the latter, by a letter dated October 23d, directed Bernstein to send him "from $2,000 to $3,000 the same way as the first $1,000 and the rest not until after termination of the war." However, Samuel Kunkel subsequently changed his instructions and under date of November 26th, wrote to the defendants as follows:

"Regarding the cash money, I am very much tormented by the children, and therefore request you, after deduction of the advance and charges of every nature, and after you have deducted for yourself the further sum of $1,000 for a Christmas present, to send, in the same manner as the $1,000 draft theretofore remitted to me, in May, everything."

The directions concerning remittances were again altered by a letter dated December 14th, and the defendants were ordered to remit in small amounts and at intervals.

Samuel Kunkel died on July 12, 1915. In September, 1916, Fritz Kirchoff, who was at that time the consul in charge of the German consulate in Portland, Oregon, was appointed administrator of the estate of Samuel Kunkel, deceased; and afterwards, on January 27, 1917, Fritz Kirchoff, as such administrator, brought this suit against the defendants Alexander Bernstein and D. Solis Cohen for an accounting.

The complaint is drawn upon the theory that the legal services performed for the benefit of the executors of the estate were not reasonably worth more than $1,500, and that, therefore, for the reasons specified in the complaint the defendants should be required to pay back $7,500. The complaint avers that, with the intent to take a corrupt advantage of Samuel

Kunkel and for the purpose of placing himself in a position to charge and to collect excessive fees, the defendants, (a) represented to Samuel Kunkel that it was necessary and proper to employ them and to appoint Alexander Bernstein as his attorney in fact and solicited him to do so; (b) advised him "to have no communication with the resident American consul in Germany" concerning the estate; and (c) concealed from him "so long as they were able, the amount of said estate, and understated the amount" of the estate. It is also averred that after having learned of the death of his brother Daniel, Samuel Kunkel, who was a citizen and inhabitant of the Empire of Germany, communicated with the German consulate in Portland, Oregon, "for advice and for the protection of his interests"; that Samuel Kunkel was advised by the German consulate—

"that it would be wise not to intrust the representation of his interests in the matter of said estate to the defendants herein whose duties and interests, as attorneys for the executors and in the matter of attorneys' fees to be allowed for the transaction of the estate business for the executors, might conflict with the duties of the said defendants in the representation of the interests of the said Samuel Kunkel";

that Samuel Kunkel wrote to the defendants telling them of the advice given him by the consulate; that the defendants corruptly intending to take advantage of Samuel Kunkel and for the purpose of protecting their own rather than his interests wrote to Samuel Kunkel and "falsely represented to him that the object of the German consulate in giving said advice was to get charge of the said business in order to make for itself fees"; that Samuel Kunkel believed the representations of the defendants, left the defendants in charge of his business and interests in connec-

tion with the estate, and "took no other or further counsel in relation thereto."

The complaint recites that Anna Kunkel began the contest proceeding on August 5, 1914, and it is then alleged that the defendants immediately began urging a compromise by: (a) falsely advising Samuel Kunkel that even if Anna Kunkel lost the contest she would, during her lifetime, as the widow of Daniel Kunkel, be entitled to one half of the income from the two-thirds interest in the real property devised to Samuel Kunkel; (b) falsely advising him that the widow would be entitled to an allowance of $250 per month "so long as the estate should remain unsettled"; and (c) exaggerating, in divers ways, the dangers and difficulties of the will contest—

"whereas, in truth and in fact, the said defendants well knew that the said Daniel Kunkel was of sound and disposing mind and memory at the time he had made the said will, and that he had not acted in any wise under undue influence of the said Samuel Kunkel, or of any other person, and that the said contest was sham and pretended; and that by said representations, and not otherwise, the said Samuel Kunkel was induced and consented to a compromise of the said litigation * * ."

The complaint charges that $3,500 was an unreasonable fee for the services rendered by the defendants to the executors and in support of this charge the plaintiff attacks the compromise, claiming that the portion of the estate awarded to Anna Kunkel should have borne a part of the taxes and expenses of administration, and criticises the defendants for having consented to a compromise which provided for the payment of all the taxes and expenses of administration out of funds in the hands of the executors. In

further support of his attack upon the fee allowed by the County Court for legal services performed for the executors, the plaintiff says that there was a large amount of cash in bank, only a few claims of creditors, no proceedings for the sale of real property and no complications; and that the professional services rendered by the defendants were brief and simple in character and that $1,500 would have been a liberal allowance for those services.

The complaint assails the $3,500 fee which the defendants charged and retained out of Samuel Kunkel's share of the estate by alleging: (a) That defendants did not furnish Samuel Kunkel with a copy of the final account or of any of the accounts filed by the executors during the administration of the estate; (b) that the defendants responded to inquiries of Samuel Kunkel by furnishing him with "indefinite and uncertain statements in general terms as to the condition, amount and value of the properties of said estate"; (c) that the defendants concealed from Samuel Kunkel and never communicated to him the fact that they had received $3,500 for the services performed by them for the executors; and (d) that Samuel Kunkel was "very aged" and was broken in mind and health and that the defendants, in their correspondence with Samuel Kunkel, flattered and cajoled him and "misadvised him in order to bring about such proceedings as would be most to their own advantage"; and that thus the defendants secured the acquiescence of Samuel Kunkel in the deduction of $3,500 from the moneys which the defendants had received from the executors as Samuel Kunkel's share of the estate.

Besides denials of the accusatory allegations found in the complaint, the answer contains affirmative mat-

ter avowing the good faith of the defendants, proclaiming their honesty of purpose, asserting their loyalty to the interests of Samuel Kunkel, and asseverating that the fees charged and collected by them were fair, reasonable and just. All the communications between defendants and Samuel Kunkel were in writing and, for the purpose of explaining the charges made against the defendants, much of this correspondence is pleaded in and made a part of the answer.

The reply reinforces the complaint with denials, affirmative averments and a recital of considerable of the correspondence between defendants and Samuel Kunkel.

The decree, from which the defendants appealed, declares that the plaintiff is entitled to recover $3,500 on the theory that the $3,500 retained out of Samuel Kunkel's share of the estate was kept by the defendants without making a full disclosure to him, and that the $3,500 allowance made by the probate court was intended to be and was in full settlement of all the services rendered for the executors and for Samuel Kunkel individually. There was no cross-appeal by the plaintiff and hence it may be inferred that he was satisfied with the decree of the Circuit Court.

REVERSED AND DISMISSED.

For appellants there was a brief over the names of *Mr. Alexander Bernstein, Mr. Martin L. Pipes, Mr. John M. Pipes* and *Mr. George A. Pipes,* with oral arguments by *Mr. Bernstein* and *Mr. Martin L. Pipes.*

For respondent there was a brief over the name of *Messrs. Veazie, McCourt & Veazie,* with oral arguments by *Mr. John McCourt* and *Mr. Arthur L. Veazie.*

HARRIS, J.—1–3. The rules which define the duties of an attorney when dealing with his client are well established. The relation between an attorney and client has always been treated as one of special trust and confidence; and for that reason the law requires that the conduct of an attorney, when dealing with his client, shall be characterized by fairness, honesty and good faith. Indeed, so strict is the injunction not to take advantage of the client, that when a client challenges the fairness of a contract made with his attorney the latter has the burden of showing not only that he used no undue influence, but also that he gave to his client all the information and advice which it would have been his duty to give if he himself had not been interested, and that the transaction was as beneficial to the client as it would have been if the latter had dealt with a stranger. The attorney, however, has a right to contract with his client for his compensation, and while courts will closely scrutinize a contract which a client claims to have been brought about by fraud or by undue advantage nevertheless a contract between an attorney and client will be upheld when it appears to be fair and honest. Stated in broad terms, the client ordinarily is not entitled to relief from an agreement concerning compensation to be paid to his attorney unless he has suffered injury through an abuse of confidence on the part of the attorney: *Hamilton* v. *Holmes*, 48 Or. 453, 459 (87 Pac. 154); *Phipps* v. *Willis*, 53 Or. 190, 194 (96 Pac. 866, 99 Pac. 935, 18 Ann. Cas. 119); 6 C. J. 686.

It must be remembered, however, that the value of services performed by an attorney cannot always be measured with the same decree of exactitude as can a bushel of wheat or a ton of coal. Education, experience, skill, judgment and knowledge are impor-

tant factors. Nor can a just appraisal be placed upon the worth of professional services if the time actually employed in the rendition of those services is taken as the sole gauge. An experienced and trained attorney might accomplish in a very short time what another could not do in a much longer time, or perchance might not be able to do at all. The responsibility involved is always a considerable item and ordinarily the greater the amount involved the greater the responsibility.

Attention will now be directed to the evidence for the purpose of determining whether the conduct of the defendants measured up to or fell short of the high standard fixed for attorneys when dealing with their clients. Letters written by the defendants and by Samuel Kunkel and by others form a large part of the record, and it will, of course, be impracticable to recite more than occasional excerpts from such correspondence or to record more than some of the most important facts disclosed by the testimony of witnesses.

The fee paid to Frank C. Hesse and the Christmas present given to the defendants may first be eliminated from the discussion. On August 5, 1914, the defendants wrote a lengthy letter to Samuel Kunkel, informing him that Anna Kunkel had commenced a proceeding to contest the will. This letter advised Samuel Kunkel that the defendants had "retained the professional service" of Frank C. Hesse, an attorney and a German scholar, "who should on account of his complete knowledge of the German language, be of great service to you." The letter explains that Mr. Hesse

"was born at Leipzig, studied at Leipzig, Hallee in Paris, and because of correspondence between you

and your brother would be drawn in question, his services as interpreter and expert will be indispensable, likewise would his services as attorney be of great assistance."

Under date of August 28th, Samuel Kunkel replied, saying: "Regarding the lawsuit. It is very good that you took Mr. Hesse to your assistance"; and, again, on September 15th Samuel Kunkel wrote the defendants saying: "I also approve of the employment of Mr. Hesse whom you took as an assistant." On November 19th the defendants wrote to Samuel Kunkel, advising him that "for Mr. Hesse's services I disbursed the sum of $1,000, for which I hold receipt." Samuel Kunkel acknowledged receipt of the letter which the defendants had written on November 19th, and while he made no specific mention of the disbursement to Hesse he must be deemed to have approved it for the reason that he stated: "With your balance I am completely agreed and satisfied." On November 26th, Samuel Kunkel addressed to the defendants a letter which contains the following:

"Regarding the cash money. I am very much tormented by the children, and therefore request you after deduction of the advance and charges of every nature, and after you have deducted for yourself the further sum of $1,000 for a Christmas present, to send in the same manner as the $1,000 draft heretofore remitted to me, everything."

The propriety of the employment of Mr. Hesse cannot be seriously questioned, especially in view of the fact that Samuel Kunkel was fully informed concerning the reasons for the employment and, with full knowledge of all the facts, approved not only the payment of a fee but also the amount actually paid. Moreover, in his first letter to the defendants under

date of February 5, 1914, Samuel Kunkel requested them to "correspond in German, as I have difficulty to understand the English language." The money which was paid to Hesse was paid for services which he himself performed and not for services rendered by the defendants and hence the money paid to Hesse should not be taken into account or charged against the defendants when ascertaining how much they were entitled to ask for their services.

The Christmas present was a voluntary gift. Samuel Kunkel knew what he was doing when he gave the defendants this Christmas present and there is no adequate reason suggested in the record for compelling the defendants to return the gift. The amount of this gift must be left out of the calculation when figuring the compensation which the defendants were entitled to ask for their services. If the Christmas present, either in whole or in part, is taken into consideration when calculating the amount which the defendants were reasonably entitled to charge for their services then to the extent that the Christmas present is so taken into consideration it ceases to be a gift, and from a Christmas present is transformed into compensation.

4. The fee which the County Court allowed for services rendered to the executors by the defendants was not an unreasonable allowance. That T. J. Cleeton, the judge to whom the final account was submitted, was temperamentally cautious and possibly overcareful when passing upon claims for attorneys' fees is evidenced by his testimony which reads as follows: "I think at least 70 per cent of the fees that I allowed were probably reduced from what the attorney asked for." Besides his experience as a practitioner Judge Cleeton had had several years of experience on the

bench. The following is an excerpt from his testimony:

"Ordinarily an estate of that size that proceeded without contest and in the usual way, the attorney's fees should be something like about twenty-five hundred dollars, from twenty-five hundred to three thousand dollars, and I estimated that to represent and provide a defense against a contest of an estate of that value it would be worth from five hundred to one thousand dollars, and I fixed the fee accordingly at thirty-five hundred dollars, which I thought was a reasonable fee."

Lionel R. Webster, who was a distinguished lawyer and had served on the bench for about fifteen years, including seven years as county judge of Multnomah County, gave it as his opinion that $3,500 or $4,000 would have been a reasonable allowance. W. M. Cake, who served as county judge of Multnomah County from 1898 to 1902 and who acted as an attorney for Anna Kunkel in the proceeding to contest the will, stated that $2,000 would have been a reasonable allowance if there had been no contest, and that if the services rendered to the executors in connection with the contest are also taken into account, $3,500 would be a reasonable fee. The compensation allowed by the probate court was not disproportionate to the compensation allowed in another large estate referred to in the record; and upon the whole the fee which was fixed for the services performed for the executors by the defendants was a moderate and reasonable sum.

The only question now remaining for consideration is whether the defendants were entitled to collect any fee at all from Samuel Kunkel, and, if they were, then whether the sum retained by them was excessive. Besides the allegations relating to the contest, it will be

recalled that the complaint avers that the defendants planned to charge and collect excessive fees and to take advantage of Samuel Kunkel by procuring a power of attorney from him, advising him not to communicate with the American consul in Germany, concealing the amount of the estate, representing that the German consulate in Oregon was trying to get the business in order to make for itself fees, failing to furnish copies of the accounts filed by the executors during the administration of the estate, responding to inquiries for definite facts with general and indefinite statements, failing to communicate to Samuel Kunkel the fact that the defendants had received $3,500 from the executors and taking advantage of the condition of Samuel Kunkel by cajoling and flattering him.

The defendants performed services for the executors; and they also performed services for Samuel Kunkel. The County Court possessed authority to allow the executors to pay the defendants for services rendered to the executors; but that tribunal was without power to allow the executors to pay the defendants for services rendered to Samuel Kunkel as an individual. The County Court exercised its conceded authority and made an allowance for services rendered to the executors; but that court did not pretend to allow the defendants compensation for services rendered to Samuel Kunkel as an individual. The allowance made by the County Court was for services rendered to the executors and to them only. The County Court considered only the services performed for the executors. The County Court had no jurisdiction over the private business of Samuel Kunkel. Moreover, the County Court neither exceeded nor attempted to exceed its jurisdiction; for when passing upon the final account of the executors the court con-

sidered only the value of the services performed by the defendants for the executors. The court neither knew nor inquired as to what services the defendants performed for Samuel Kunkel or as to the value of those services. The allowance made by the County Court was a reasonable allowance for services rendered to the executors; and since such an allowance could not have lawfully included and in fact did not include compensation for services rendered to Samuel Kunkel as an individual, we shall now confine our attention to a consideration of the fee which the defendants charged Samuel Kunkel.

The letter of January 17th was written by the defendants in compliance with the request which Daniel Kunkel had made on December 2, 1912, when he executed the will. The will was placed in a safety deposit box and neither of the defendants had seen the instrument since the date of its execution. When the defendants wrote this letter they were without assurance that they would be retained as attorneys for the executors; and while they probably hoped to be employed yet there was some reason for them to think that the executors would seek other attorneys, for the defendants had previously opposed one of the executors in litigation in which he had been interested.

In the letter of January 17th the defendants advised Samuel Kunkel to cause the American consul "to put his acknowledgment" on the power of attorney. On February 5th Samuel Kunkel wrote saying:

"I have communicated with the American consul and hope shortly to be able to send you the power of attorney."

And on February 23d the defendants acknowledged receipt of Samuel Kunkel's letter of February 2d, and, among other things, said:

"In our opinion you acted very judiciously in communicating with the American consul, inasmuch as his official attestations of legal documents are entitled to full faith and credit in all American courts and by all American officials.

"In our opinion it would not be wise for the best of your own interests to inform the American consul of the exact amount of your expected inheritance, since he will charge you a fee, which is based on a certain percentage of your inheritance. The larger the inheritance the larger his fee. Outside of a few official attestations, he cannot do anything for you in the matter and would charge you just the same a certain fixed percentage for his mediation. Your inheritance you will receive without his intervention, and for that reason it is useless to pay him a fee for nothing."

It may be that the defendants were misinformed as to the fees charged by the American consul. The defendants knew, however, that the German consulate in Oregon made a percentage charge on moneys collected and sent to Germany; and there is nothing to show that the defendants knew or believed that the fees charged by the American consul in Germany were other than as represented in their letter. Assuming that the fees charged by the American consul were in proportion to the amount of the inheritance then the advice given by the defendants was to the best interests of Samuel Kunkel.

In their letter of January 17th the defendants told Samuel Kunkel that Daniel Kunkel had requested them to advise Samuel Kunkel that he "would receive a substantial share of" Daniel's property; and in their letter of February 23d the defendants wrote as follows:

"In our opinion, your share ought to be worth about 200,000 marks."

While Samuel Kunkel's share of the estate amounted to more than 200,000 marks, yet it is apparent that the defendants were not attempting to do more than to give a conservative estimate, because they neither knew nor had any means of knowing at that time the exact amount of the claims which might be presented against the estate. Indeed, the attorneys for the German consulate, when called upon at some time prior to June to advise the consulate concerning the condition of the estate, were properly prudent and careful when they stated:

"There is a possibility that the estate will have to pay debts which are not known to us at the present."

It cannot, however, be seriously contended that Samuel Kunkel was deceived or misled as to the affairs of the estate or as to the value of the property. On February 21st Cake & Cake, as attorneys for Anna Kunkel, wrote to Samuel Kunkel and in their letter they informed him that the real estate was valued at "substantially $29,000," and that the personal property, consisting of notes, cash and stock, "was valued at substantially $75,000." Ida Kunkel, who resided in Germany and was the widow of a deceased nephew of Daniel Kunkel, wrote to the German consulate, and on April 11th Samuel Kunkel also wrote to the German consulate, inquiring about the condition of the estate of Daniel Kunkel; and Samuel Kunkel afterwards learned from the German consulate the exact condition of the estate as it appeared from the inventory and appraisement. On March 3d, the defendants sent to Samuel Kunkel copies of the will, one in German and one in English. On April 28th, the defendants wrote a letter to Samuel Kunkel explaining to him that they had fixed 200,000 marks as "a conservative estimate of your share of the in-

heritance." And again on July 2d the defendants wrote to Samuel Kunkel telling him that the value of the estate was $98,886.08 and that—

"you must deduct the costs of the administration of the estate as well as the inheritance taxes, yearly taxes, etc., etc., which sums are not yet known to us. Nevertheless, we believe that you may count with safety on your share amounting to at least two hundred thousand marks. For further explanations on this point we refer you to our former letters."

Samuel Kunkel knew the terms of the will; he knew what the estate consisted of; he knew the appraised value of the property owned by the estate; and consequently he was not and could not have been deceived either as to the property comprising the estate, or as to its value, or as to the worth of his share.

On June 15th Samuel Kunkel wrote to the defendants and with his communication he inclosed a copy of a letter which the attorneys for the German consulate had written to the consulate and which the latter had forwarded in response to inquiries previously made by Ida Kunkel and Samuel Kunkel. The letter received by Samuel Kunkel from the German consulate referred to the defendants and concluded thus:

"We do not consider it advisable for foreign heirs to intrust the representation of their interests to the same attorneys who are representing the executors, and with whom an accounting must be made, and who most probably are representing conflicting interests."

The communication of June 15th was acknowledged by the defendants on July 2d and in their letter they stated in substance, that Samuel Kunkel would be obliged to pay fees if his interests were placed in the hands of the German consulate and that the consulate was apparently interested in securing the busi-

ness on account of the fees which it would be entitled to charge. While not the slightest criticism can be placed upon the letter which Samuel Kunkel received through the German consulate, yet it is evident that the defendants treated the letter as an attempt to cause Samuel Kunkel to withdraw his business from the defendants; and viewing the letter in that light, they accordingly wrote to Samuel Kunkel on July 2d, as already explained. It may appropriately be said here that it is admitted by all the parties that fees would have been charged if the interests of Samuel Kunkel had been turned over to the German consulate.

5. As soon as the will was opened and its contents made known Anna Kunkel indicated her dissatisfaction with the terms of the instrument. She promptly consulted her attorneys, Cake & Cake, who wrote to Samuel Kunkel on February 21st and made it plain to him that he could expect the will to be contested by Anna Kunkel. On March 14th, Samuel Kunkel wrote to the defendants and inclosed a copy of the communication received by him from Cake & Cake. Samuel Kunkel was about 78 years old; his wife was sick; and apparently he was in need of funds because in one of his letters he speaks of himself as a pensioned teacher and complains because his government had not paid his pension. In this letter of March 14th Samuel Kunkel writes to the defendants thus:

"If in truth there can result a long and expensive litigation, which I prefer to avoid, it would be better to bring about a fair compromise, if the same is advantageous to me and if I do not lose much thereby, and I entreat you to have the goodness to exert yourself in my behalf with this end in mind. Inasmuch as I am two and a half years older than my deceased brother Daniel, there is a probability of my never living long enough to see the end of such a lawsuit.

Therefore, much depends upon putting me in the possession of my share as soon as possible. I assume that you have mailed already a copy of the last will, though I have not received the same as yet. Have the goodness to inform me of current developments and please take care that the matter is brought to a conclusion as rapid as possible, for I do not live in such easy financial circumstances as my deceased brother Daniel, and would like to enjoy at least a few of my old days."

Under date of March 30th, the defendants acknowledged receipt of Samuel Kunkel's communication of March 14th and in this letter the defendants tell Samuel that in their opinion

"Mrs. Kunkel has not the slightest ground to overthrow the last will and testament of your deceased brother"; and "though we have not the least doubt regarding a favorable ending of such a lawsuit, we must, on the other hand, admit that we cannot prevent Mrs. Kunkel from instituting such a contest. Furthermore, although you empower us in your Power of Attorney to compromise your interests if necessary, we would under no circumstances enter in such a compromise should we not be empowered to that effect by you expressly."

On April 21st the defendants wrote to Samuel Kunkel as follows:

"Should you prefer not to listen to a compromise, but to insist upon your full rights, we shall act in accordance with your wishes in the matter. Should you, however, prefer to pay Mrs. Kunkel a certain amount in a compromise, in order to get the matter out of the way, and in order to put you in possession of your share of inheritance quicker, please give us an approximate idea of the maximum amount, or if you intrust the matter entirely to our judgment, please advise us forthwith of your intention and we shall then do for you whatever is within our power. If you were not so advanced in years, we would posi-

tively advise you not to listen to a compromise, but under the existing circumstances a sensible and not too expensive compromise would probably be the best for you; but we leave the matter entirely to you and shall act entirely according to your wishes."

On May 8th Samuel Kunkel thanks the defendants for information regarding "the incontestability of the testament." On August 5th the defendants advised Samuel Kunkel that negotiations for a compromise "are still under way" and that the defendants were of the opinion that a compromise could be effected whereby Anna Kunkel would receive the real property and Samuel Kunkel would receive

"all moneys remaining after payment of debts and claims against the estate, which ought to be approximately $25,000, as well as the mortgage for $27,500, which is as good as cash."

On August 17th the defendants wrote to Samuel Kunkel that they were

"as positive as we can possibly be that a settlement as outlined to you before [referring to the letter of August 5th] can be brought about";

and they closed their letter with a suggestion that he telegraph his answer. On August 28th Samuel Kunkel wrote to the defendants in reply to their letter of August 5th, saying:

"Since I was in full accord with your advice regarding the offer of compromise, I sent forthwith to the telegraph office. Unfortunately my telegram was on account of the war not accepted."

Again in this letter Samuel Kunkel says:

"I express the hope that you may succeed to settle my affairs successfully."

Not having heard from Samuel Kunkel the defendants on September 4th sent to him a copy of the an-

swer to the contest filed by them in his behalf as well as for the executors; and in this letter the defendants advised and indeed urged the acceptance of the compromise; but as appears from the excerpt taken from Samuel Kunkel's letter of August 28th, he had already forwarded his acceptance although it had not yet reached the defendants when they wrote their letter of September 4th. On September 15th Samuel Kunkel wrote to the defendants in answer to their letter of August 17th, saying:

"No answer thereto is really necessary, since I can only repeat to-day what I wrote you already in my letter of August 31, [August 28th] that I accept the submitted compromise."

The contest, which Anna Kunkel began, was genuine. Anna Kunkel had lived with Daniel Kunkel for 25 years and had helped him to accumulate his fortune. There were no children. Daniel Kunkel and his wife together with a niece of the former made a trip to Germany in 1911 and visited Samuel Kunkel and other relatives. Anna Kunkel felt that during that trip she was "slighted" by her husband's relatives. Daniel Kunkel used intoxicants to excess. Shortly after returning to Portland, Daniel Kunkel expressed to Alexander Bernstein a desire to make another will and after some delay the instrument of December 2, 1914, was executed. All the wills which the testator had made prior to that time gave at least some of the personal property to Anna Kunkel. The will of December 2d, in reality, only gave her one tenth of the whole estate while the remainder went to the aged brother who had no unusual claims upon Daniel's bounty. Although the defendants, as attorneys for Samuel Kunkel, appeared to be confident of success in the event the contest against the will had been prosecuted

to the end and the attorneys for Anna Kunkel likewise seemed to have been very much encouraged over the prospects of finally breaking the will, yet it is not at all unlikely that by the time the compromise was made the attorneys for each litigant were just a little doubtful of the possible outcome of protracted litigation over the will. The defendants made it plain to Samuel Kunkel, it is true, that the litigation would be long-drawn out and they also suggested to him several contingencies, some of which might or might not have happened. Although the defendants caused a monthly allowance to be made for the widow, nevertheless they tried, but without success, to have the court cut off the allowance when Anna Kunkel commenced the contest against the will. The testimony of W. M. Cake is quite convincing that the contest was begun and maintained as a real lawsuit. Judge Cake vouched for the loyalty of the defendants to the cause of their client, when he testified that "Mr. Bernstein and Mr. Cohen got me down to the very lowest we would have possibly considered a settlement." Samuel Kunkel was at all times desirous of compromising, because he was old and wished to enjoy his "inheritance" before he died. The compromise enabled him to realize his desire. The defendants appear to have been earnest and faithful in their efforts to obtain the most that they possibly could for their client, Samuel Kunkel.

6. Samuel Kunkel was never deceived about the defendants being attorneys for the executors. As early as February 23d the defendants wrote to Samuel Kunkel, telling him:

"Messrs. Peter Wagner and Edward Schiller are named in the testament as the executors, on account of their intimate and long-standing friendship with

your deceased brother. Same have appointed us as their attorneys, and as a consequence we have been recognized as such by the County Court."

On April 20th Samuel Kunkel wrote to the defendants offering to sell to them his share of the estate for $50,000. On April 28th Samuel Kunkel was told that

"all debts of the deceased, as well as inheritance tax, state taxes, funeral costs, fees of the executors and attorneys' fees, costs of the monument, etc., must be paid"; and that "the fees of the executors and of their attorneys are determined by the court."

On May 7th the defendants acknowledged receipt of Samuel Kunkel's letter of April 20th, and said to him:

"Your offer to sell your share in the estate for $50,000 to us we have to decline with thanks. Since we deem it our duty to realize out of the estate as much for you as possible, and our position of trust prohibits us to make a personal profit on you, excepting attorneys' fees, which we are allowed by the County Court for the probating of the estate, and such fees which we shall charge you in establishing your share of inheritance and cashing the same."

The letter received from the German consul by Samuel Kunkel and referred to by him in his letter of July 2d to the defendants, advised him that the defendants were attorneys for the executors. In their letter of August 5th the defendants say to Samuel Kunkel:

"The executors lost no time to file the first report as required by law after the expiration of the six months' period, and the same shows expenditures in the amount of $3.357.93 for funeral expenses, doctor bills, etc., as well as unpaid claims in the amount of $1,950, payment of which the court ordered. This last amount does not include inheritance tax, state taxes, executors' fees, neither fees to be allowed to the at-

torneys of the executors for administration of the estate. Besides this the court authorized a $500 monument."

On November 19th the defendants addressed a lengthy letter to Samuel Kunkel advising him of the confirmation of the final account and that they had received $27,600 (less certain specified costs) in cash together with the note for $27,500 as his share of the estate. In this letter they also state that "for the professional services of Messrs. Bernstein & Cohen which have been rendered for you to date, I charge the sum of $3,500"; they refer to an inclosed draft for $3,000 and then say that there was left in their possession "a balance of $20,089.02 at your disposal." On December 14th Samuel Kunkel acknowledged receipt of the letter of November 19th and said: "With your balance I am completely agreed and satisfied." Thus it is seen that Samuel Kunkel was repeatedly told that the defendants were attorneys for the executors. This information came to him several times from the defendants and once from the German consulate. He was told also, in plain and understandable language, not only that the defendants would be paid a fee to be allowed by the probate court for services rendered for the executors but also that he himself would be expected to pay the defendants "such fees which we shall charge you in establishing your share of inheritance and cashing the same." Samuel Kunkel was told three several times that the defendants were acting as attorneys for the executors: Twice by the defendants and once by the German consulate. In their letter of February 23d, which was the very next letter the defendants wrote after the one dated January 17th, they informed Samuel Kunkel that they had been selected as attorneys for the executors. On

May 7th the defendants again told Samuel Kunkel that they were acting as attorneys for the executors. In addition to the two letters received from the defendants, Samuel Kunkel received one from the German consulate telling him that the defendants were attorneys for the executors; and the fact of such employment was emphasized and written in large letters before the eyes of Samuel Kunkel when he was told through the consulate:

"We do not consider it advisable for foreign heirs to intrust the representation of their interests to the same attorneys who are representing the executors."

Three different times the defendants advised Samuel Kunkel that they would be paid for services rendered by them to the executors: On April 28th, on May 7th and on August 5th. Samuel Kunkel was advised in unmistakable language that the defendants would charge him a fee for services rendered to him and in this same letter, which was dated May 7th, the defendants told him that in addition to the fee which they would charge him they would be paid a fee for services performed for the executors and that the latter fee would be fixed by the County Court. The letter of May 7th tells Samuel Kunkel that the defendants cannot "make a personal profit on you, excepting attorneys' fees, which we are allowed by the County Court for the probating of the estate, and such fees which we shall charge you in establishing your share of inheritance and cashing the same." In this letter of May 7th Samuel Kunkel was advised of two things: (1) That the defendants would be paid a fee to be fixed by the County Court for services rendered to the executors; and (2) that the defendants would charge Samuel Kunkel a fee, for they say "we shall charge you."

It must be remembered that Samuel Kunkel was a teacher; he was not an ignorant or an uneducated man; he knew the meaning of words; and consequently since he was an educated man with a thorough understanding of the German language we must presume that he understood the meaning of the words found in the letters received by him. With the exception of the letter of January 17th, all the letters signed by the defendants were written in the German language and consequently we must assume that Samuel Kunkel understood the letters which told him in the plainest language that the defendants were attorneys for the executors and that they would be paid a fee to be fixed by the County Court for the services performed for the executors and that the defendants would also charge Samuel Kunkel a fee for services performed for him. To say that Samuel Kunkel did not know that the defendants were attorneys for the executors or that he did not know that the defendants were to be paid for services rendered by them for the executors or that he did not know that the defendants expected to charge him for services to be rendered for him individually is to say that Samuel Kunkel did not know the meaning of plain and unambiguous words. When the defendants made known to Samuel Kunkel the amount of their bill he had been previously informed that the defendants were attorneys for the executors and that they would be paid for such services a fee to be allowed by the County Court; and Samuel Kunkel approved the bill, rendered by the defendants, with this knowledge and also with a knowledge of the property owned by the estate, the value of it, the amount of the moneys disbursed by the executors, and the net value of his "inheritance." He continued to correspond regularly with

the defendants up until the time of his death and in none of his letters, following his approval by the letter of November 19th, is there to be found the least suggestion or intimation of dissatisfaction; but upon the contrary Samuel Kunkel's letters manifest his unreserved and complete approval of the fee which the defendants charged him. Some attorneys might have sent to Samuel Kunkel complete copies of every paper filed in the estate, while other equally reputable attorneys might not have done so. Viewing the transactions in the retrospect and in the light of what has subsequently occurred, it can, of course, now be said that it would have been more prudent if complete copies of all papers had been prepared and mailed to Samuel Kunkel.

7. It is true that it was the duty of the executors to support the will and it is likewise true that it was to the interest of Samuel Kunkel that the will be sustained; and hence in that particular there was a unity rather than a conflict of interest between the executors and Samuel Kunkel. The only possible conflict of interest that could have arisen was when the county judge fixed the attorneys' fees for services rendered to the executors; but Samuel Kunkel knew that the defendants were to be paid a fee to be fixed by the court and Kunkel had a right to consent to it, as he did.

Samuel Kunkel was a necessary party to a settlement of the contest: 40 Cyc. 1262. If the will stood he received nine tenths of all the property of the testator. If the will had been broken then he lost all. The executors could not without his consent make a settlement of the contest which would take from him his interest in the real property and transfer it to Anna Kunkel. His approval of the compromise was

necessary. In view of the fact that Samuel Kunkel was the only person who could be affected by a compromise, which decreased his share of the estate and correspondingly increased the portion of Anna Kunkel, it can readily be seen that there was much room for the rendition of services which were peculiarly personal to Samuel Kunkel alone. The services rendered by the defendants were assuredly of value to Samuel Kunkel. Indeed, if he had turned his interests over to the German consulate he would have been required, and properly so, to pay for the services performed for him in looking after his interests; and, furthermore, it appears from the evidence in the record that the fees which the consulate would have charged for its services and for the services of its attorneys probably would have aggregated about $3,900. In other words, in addition to whatever fees might have been paid out of the estate to the attorneys for the executors, Samuel Kunkel would have been required to pay fees for services rendered for him individually if he had turned his business over to the German consulate. It cannot fairly be said that no valuable service was performed by the defendants for Samuel Kunkel individually. If the measure which was used by the German consulate in like cases is adopted as the standard then the fee retained by the defendants can be said to be within the limits of that measure. Moreover, Samuel Kunkel approved the fee and never at any time questioned the propriety or the amount of it. The decree appealed from should be reversed and the suit dismissed without costs. REVERSED AND DISMISSED.

JOHNS, J., Concurring Specially.—In legal effect the trial court affirmed the action of the County Court in allowing the defendants $3,500 as attorneys' fees

on settlement of the final account of the estate and found that it was—

"in full payment for all services the defendants had rendered both to the executors and to Samuel Kunkel in connection with the settlement of said estate and the will contest; and that the amount so allowed constituted a reasonable remuneration for the said services."

The plaintiff did not appeal: Samuel Kunkel was not only made a party to the contest of the will, but he was a necessary party.

"All persons who may be injuriously affected by the judgment or decree sought, should be made defendants. Thus the beneficiaries in the will, heirs at law and next of kin, as well as the executor, if he has qualified as such, are usually deemed necessary parties": 40 Cyc. 1262, and authorities there cited.

As a matter of fact the executors were nominal parties and Samuel Kunkel was the only real party in interest.

While it was the duty of the executors to uphold and defend the will, and for that purpose they filed an answer, as such executors they would not and did not have any legal right to appear for Samuel Kunkel or to represent his interests otherwise than as executors, and could not make or enter into any valid, binding agreement of settlement or compromise without his express authorization and approval. If Samuel Kunkel had employed other attorneys than the defendants to represent his personal interests, the County Court would not have any right to determine the amount which such attorneys should receive for their services. So, in this case, the only authority which the County Court had was to ascertain and allow the amount of fees which the defendants should have for

legal services rendered to the executors as such, in the will contest; and it did not have any authority to fix or determine the amount of attorneys' fees which Samuel Kunkel personally should pay the defendants for services which they rendered him in the contest personally, as distinguished from the services which they rendered the executors. Nor is there any conflict in the character of such services. Any services which the defendants rendered in the compromise or settlement were personal to Samuel Kunkel. Hence the only question to be determined is their reasonable value.

It is conceded that Cake & Cake received $1,500 for their services in the matter of the contest only, and their client was a resident of Portland. The defendants' client was a resident of Germany, aged and burdened with disease, to whom a settlement was very important and for whom the defendants rendered much additional service. On this theory there is abundant testimony in the record that $3,500 is a reasonable fee for the personal services which the defendants rendered Samuel Kunkel, and for such reasons I concur in the opinion of Mr. Justice HARRIS.

BENNETT, J., Dissenting.—The object of this suit is to recover from the defendants, a firm of attorneys, certain sums, retained by them out of the estate of one Daniel Kunkel, for their fees as attorneys for the executors, and also as attorneys for the chief beneficiary of the estate, whose interests were also represented by the defendants herein.

Daniel Kunkel, in the matter of whose estate the services in question were performed, died in Portland, Oregon, on January 17, 1914, leaving an estate of the approximate value of $100,000, about $30,000 of which

was in real property, and the balance in money and secured notes. Mr. Kunkel had resided in Portland for many years. He left no lineal descendants, but was survived by his wife, to whom he had been married about twenty-five years. The latter years of their married life had apparently not been very happy, and when Daniel Kunkel died he left a will by which he bequeathed one third of the real property to his wife, and the balance of the real property and all of the personal property to Samuel Kunkel, a brother living in Germany. The defendants herein had been the attorneys for Daniel Kunkel for several years, and had drawn the will under which Samuel Kunkel claimed. After the death of Daniel Kunkel, the defendants notified his brother Samuel of Daniel's death, and that Samuel was a beneficiary under the will. Afterwards the executors named in the will were appointed by the court and proceeded to administer the estate. The defendants appeared as attorneys for the executors and also represented the interests of Samuel Kunkel. The widow, naturally, being dissatisfied with the will, threatened and finally actually commenced a contest, in which an answer was filed on behalf of the executors, and on behalf of Samuel Kunkel, by the defendants, but the case never went to trial. A compromise was arranged, to which all parties consented, and by which the wife received the real property absolutely, and also received out of the estate, $1,500 to pay her attorneys' fees and expenses in the contest proceedings, and the balance of the estate went to Samuel Kunkel under the will. After paying the expenses of administration, some small debts, the inheritance taxes, attorneys' fees, etc., there was turned over to Samuel Kunkel, and to his estate after his death, the sum of about $24,089 and an uncollected

promissory note for $27,500. The defendants did the necessary legal work for the administration of the estate, represented the executors in the contest proceedings, and also negotiated for and with Samuel Kunkel, and between him and the widow, in arranging the settlement, and they received from the executors, his share of the money and transmitted the same, according to his direction, to him in Germany.

The defendants presented their claim for fees for their services to the executors, in the sum of $3,500, which was allowed by the County Court. They also made a charge directly against Samuel Kunkel for another $3,500 for their services to him. In addition to this, Kunkel, at one time—having received from the defendants an installment on his inheritance, and being generously minded—authorized them to take out $1,000 from his share of the estate, as a Christmas present for them, which they did. They also employed one Hesse, a German attorney in Portland, to assist them as attorneys, and especially in the translation of German letters and papers, for which they agreed to pay him $1,000. This, they reported to Kunkel and he approved the same.

Kunkel was informed of their charge for $3,500 for their services to him individually, and it is claimed he assented thereto, but he was not informed that they had also charged up and received from the executors another $3,500 for their services to the estate, including the contest; and it is claimed on behalf of respondent that his assent to the payment of the last $3,500 was obtained and procured by the willful suppression of the fact that they had already been paid for these services by the estate.

Before the estate was finally settled Samuel Kunkel also died, and the plaintiff herein brings this proceed-

ing as his administrator, claiming that the fee paid to the defendants, as attorneys for the executors, was exorbitant and should not have exceeded $1,500; that said amount should have covered their entire services, both for the estate and for Samuel Kunkel individually, and also for the services of Hesse; and that the gift from the client to the attorneys of the $1,000, should not be permitted to stand.

The court below allowed the defendants the $3,500 as attorneys for the executors, the $1,000 for the services of Hesse, and the $1,000 as a gift, but refused to allow the $3,500 charged for direct services to Samuel Kunkel. From this decree the defendants appeal.

From the opinion of the majority of the court I am compelled to dissent. Measured by the value of the services performed by the appellants for Mr. Kunkel, and for which they were not otherwise recompensed, their charge of $3,500 seems to me exorbitant and unconscionable; and, as I view it, Mr. Kunkel's approval of that fee was obtained by such an important and unfair suppression of fact, as to prevent the defendants from gaining any advantage by such alleged approval, under the rule governing the relation of attorney and client, as stated in the majority opinion.

With the rule governing the duty of an attorney toward his client, as stated in that opinion, I am entirely satisfied. I quote again from the language of the opinion, taking the liberty of italicizing the portions which seem to me to have more particularly concrete application to this case.

"The relation between an attorney and client has always been treated as one of special trust and confidence; and for that reason the law requires that the conduct of an attorney, when dealing with his client, shall be characterized by *fairness,* honesty and good

faith. Indeed, so strict is the injunction not to take advantage of the client, that when a client challenges the fairness of a contract made with his attorney the latter *has the burden of showing* not only that he used no undue influence, *but also that he gave to his client all the information* and advice which it would have been his duty to give if he himself had not been interested, and that the transaction was as beneficial to the client as it would have been if the latter had dealt with a stranger."

These are brave, strong words, and with every syllable of them I entirely concur. They fix the duty of an attorney toward his client at a high standard—but not too high, when we consider the peculiarly confidential relation which an attorney enjoys; and the fact, that those with whom he deals, are oftentimes helpless from infancy or old age, and are generally ignorant of the law, and of their legal rights; and practically at the mercy of the lawyer who represents them. Such a declaration of the principles which govern attorneys, will be an inspiration to the lawyer who cares deeply for his profession and for its honor.

When it becomes generally known, that this is the standard which governs the conduct of attorneys—and that the courts unflinchingly carry the principles so declared into execution—there will be an end of that unjust belief, unfortunately now so general among laymen, that lawyers are mercenary and unscrupulous grafters; and that the courts, being composed of lawyers promoted, look with complacent tolerance, and winking eye, upon the unjust greed and rapacity of their erstwhile associates.

If I would add anything to the words of the majority opinion in this regard, it would be in the language of Mr. Thornton in his excellent new work on Attorneys:

"Attorneys, in entering into contracts of employment with clients, are required to exercise the *highest order of good faith*, not only in advising the client, but also in disclosing *all* information in their possession, as to facts which *would* or *might influence him*, either in entering into or refusing to execute the contract. The failure to do so renders the contract *presumptively void*. * * The burden is *on the attorney* to show that the client was advised and informed": 2 Thornton on Attorneys, § 429, p. 743.

Keeping in view, then, the rule in such cases, let us attempt to apply it in this case, and see whether or not the conduct of the defendants in the case measures up to these high standards. For if it does not, and we, directly or tacitly, approve of their action, and help them to reap the profits of the transaction, then, as it seems to me, our fine words had far better never have been said. They will be "like dead sea apples—pleasant to the sight but ashes to the touch."

I assume—as there is no appeal by the plaintiff from that part of the decree which favored the defendant—that the only question before us which we can readjudicate, is the claim for the last $3,500 for the services alleged to have been rendered by the appellants to Mr. Kunkel individually. However, it does not follow, that we should not consider the other sums received by the appellants, in so far as they affect the fairness and justice of the charge of the last $3,500, which *is* before the court—for instance, if the sum of $3,500 received by the appellants from the executors was for the same services, or part of the same services, for which they are now trying to charge Kunkel individually; then having once received compensation therefor, it would be utterly unjust to permit them, to again collect from Mr. Kunkel, for the same service. No court of equity would permit so

unjust a result, and if it would, it would cease then and there, to be a "court of equity."

The same suggestions apply to the $1,000 collected by the appellants and turned over to Hesse, for assisting in doing whatever was done, in the matter of Mr. Kunkel's individual interest. If he performed part of the services and was paid by Mr. Kunkel, that *reduces the work left to be done by the defendants,* in the same matter; and it would be obviously unjust for them, having induced Kunkel to pay the $1,000 to Hesse, to then charge him again in their own behalf for that part of the work which he had already paid Hesse for doing. It becomes necessary, then, in analyzing the case, and finding out whether this last charge of $3,500 to Mr. Kunkel individually, was just or unjust, to separate the work for which they have already been paid by the executors, and the part of the work of taking care of Mr. Kunkel's interests performed by Hesse, from the remainder of the services performed, so that we can see what services are left, and what, if any, fair relation, they bear to the large sum charged.

In considering this question we must remember constantly that *all* the amounts received by the appellants, came, directly or indirectly, *out of Mr. Kunkel's pocket.* The $3,500 paid to the defendants by the executors was really paid by Mr. Kunkel, for he was the residuary legatee, and everything left from the estate belonged to him. At the time when these fees were allowed by the executors, it had been agreed exactly what Daniel Kunkel's wife was to receive, and the defendants, and everyone else, who had any relation to the case, knew full well, that whatever came out of the estate in the way of executors or attorneys' fees, came out of funds otherwise belonging to Samuel

Kunkel. Indeed there was no longer any real necessity or reason for separating the fees, unless it would be, by this manipulation, "to make two fees grow, where one had grown before."

Of course, in determining the services which the defendants had a right to charge up as an individual charge against Samuel Kunkel, I think it will at once be conceded, that they had no right to charge for any services in overseeing the final settlement and protecting his interests, in the matter of the executors' fees and their own attorneys' fees, for the simple reason that they *did* nothing, and could do nothing, in that regard; for in that, the defendants had put themselves in an impossible and inconsistent position. They were attempting to represent the executors, who were interested in getting the largest possible fees, and they were also interested in getting the maximum fees for themselves. And at the same time, they were supposed to be representing the interests of Mr. Kunkel; whose interests were, to have the executors and attorneys' fees reduced to the smallest possible margin. The result was, that no one really represented Mr. Kunkel before the County Court at all. There were no objections whatever filed to the executors' fees; neither was there any objection made to the fees demanded by the attorneys.

In practice, the arrangement worked out beautifully. The executors and attorneys, apparently, resolved themselves into sort of a mutual approval society. The executors came in and demanded their fees. They demanded the statutory fee, not only on the personal property, which passed through their hands, but also upon the $30,000 worth of real property, for which they did not account at all. And in addition to this, they demanded their fees on the whole estate, as erro-

neously appraised at $108,000, although $10,000 of that was an obvious double appraisement, and the estate really totaled only $98,000. Nevertheless, these fees were, apparently, approved by the defendants. Indeed, we may safely assume that the report of the executors, asking for these executors' fees, was written by the defendants as their attorneys.

Again the executors, with equal complacence, included in their report a request—in addition to their own fees—for $3,500 for the attorneys, although it appears from the evidence that the fees fixed by the rules of the Bar Association for acting as attorneys in such an administration, would only have been about $1,000 or $1,100; and to these attorneys' fees again there was, of course, no objection, and Mr. Kunkel's interests again were not represented. The County Court, finding that there was no objection whatever on behalf of Mr. Kunkel's attorneys, and that the executors' claim for fees was approved by the attorneys, and that the attorneys' claim for fees was approved by the executors, allowed each of them the full amount claimed.

It is obvious that the appellants' supposed representation of the individual interest of Mr. Kunkel was, in this particular, really of no value whatever. They did nothing for him, and in the very nature of things, could do nothing for him. They were trying to perform two inconsistent duties—to ride two horses going in different directions. It goes without saying that attorneys cannot properly act for both parties under such circumstances, even with their consent.

"Even by the consent of the parties, an attorney is not permitted to act on both sides of a cause": Weeks on Attorneys, § 120.

"It is a well-settled general rule that an attorney cannot represent conflicting interests, or undertake the discharge of inconsistent duties": 1 Thornton on Attorneys at Law, § 174.

"So an attorney for the executors of an estate is disqualified to represent the heirs for the purpose of supervising the proceedings of the executors with reference to distribution": Id., § 175.

Now let us see how much of the services performed by the defendants in the whole transaction were paid for by the $3,500 received from Mr. Kunkel's funds, through the executors, and, therefore, not fairly chargeable to him again, as an individual. That this fee paid through the executors was intended to and did cover, practically the entire services in the matter of the contest, seems entirely plain. Judge Cleeton, who presided in the County Court and allowed the fee, and therefore must be presumed to know, being called by the defendants, testified:

"The matter came up in regular order and in due course of the administration after the settlement had been reached by the attorneys representing the respective contesting parties, and after it had been approved by the court, it came on then for fixing the fees for the attorneys. It came on *without a contest and without any objections being filed.* Mr. Bernstein *presented the claim for attorneys' fees,* and stated the attorneys claimed for their services *$3,500 representing the executors of the estate.*

"Ordinarily an estate of that size that proceeded without contest and in the usual way, the attorneys' fees should be something like about $2,500 to $3,000, and I *estimated that to represent and provide a defense against a contest of an estate of that value,* it would be worth from $500 to $1,000, and I fixed the fee accordingly at $3,500."

On cross-examination he testified:

"Q. Mr. Bernstein, himself, asked that the fees

should be as much as $3,500, did he not, when he presented it to you?

"A. Yes—he made application for his fee as is customary by attorneys.

"Q. That was fixed before the account was filed, was it not?

"A. I think he put his claim in—he made an oral statement of the matter to me that he had asked for an attorneys' fee of $3,500."

Again in his cross-examination:

"Q. In connection with his application to you to fix the fee, Mr. Bernstein always called attention to the fact that the attorneys, himself and Mr. Cohen, had handled the contest matter and made the compromise, did they not?

"A. Yes, I understood that. I understood that.

"Q. You took that into consideration in fixing the fee?

"A. Yes, sir.

"Q. Do you know what the Bar Association rule is (as to fixing attorneys' fees for executors)?

"A. No, I *think they allow the attorney about one half of what the administrator is supposed to get.* * *

"Q. Also in this case, there were no probate sales, were there?

"A. I don't remember that there were—I think not.

"Q. And there was, I believe, only one account—the final account?

"A. Yes, that would leave only the final account in that case.

"Q. The final account itself, was a very brief document, was it not?

"A. I think, from the nature of the estate, the final account was not a complex or comprehensive document.

"Q. *You were taking into consideration the services rendered,* I believe you have already said, in *connection with the handling of the contest and the compromise of it in fixing those fees?*

"A. Yes, sir."

Judge Cake, who was also called as a witness for the defendants, in his deposition testified:

"Well, I didn't take any part in the matter at all. *Mr. Bernstein suggested to the court the work of the attorneys, referring to this case* (the contest) and I didn't remember what the fees were fixed at. The court considered the matter talked over with Mr. Bernstein and asked questions concerning the situation, and it was fixed *in the immediate light of the litigation which had just been concluded.* * *

"Q. At the time the court made the order allowing the attorneys' fee of $3,500, the court's attention was particularly brought to the matter of this litigation, as I understand it?

"A. To the what, you say?

"Q. Was particularly drawn by Mr. Bernstein to the matter of this will contest and the services that had been rendered in that connection.

"A. *That was brought up. I stood there at the end of the bench and Mr. Bernstein stood in front of the court, and he told him the circumstances under which the litigation had been brought,* and the other conditions with which the administration of the estate was affected.

"Q. The allowance of the attorneys' fees was based upon Mr. Bernstein's statement that was thus submitted, as I understand?

"A. Why, of course; now I could not tell you about that, but the history of the case and the history of the estate would, of course, be well known to Judge Cleeton.

"Q. *Yes, but attention was drawn to the fact that the attorneys for the executors had attended to the will contest and also to the settlement that had been made.*

"A. Yes, yes.

"Q. These items were brought in for the court's consideration?

"A. Yes, oh, yes."

And again the same witness testified:

"A. Yes, about the way I figure that, Mr. Veazie,

is this: Even if this suit had not been in there, if there had not been any suit there and had been the administration of the estate, a couple of thousand dollars for the ordinary estate of a hundred thousand dollars should be charged.

"Q. You figure that if there had not been the litigation over the will, $2,000 would have been a fair fee?

"A. *If there had not been any litigation at all, yes, $2,000 would have been a very fair fee for the executors.*

"Q. And there ought to have been an allowance of $1,500 more for the conduct of the will contest?

"A. Yes, yes; very, very reasonably so; very reasonably so."

Indeed, the large fee of $3,500 for the attorneys in this simple estate, could not possibly have been sustained upon any other theory. Every witness called for the defendants, who testified that the $3,500 was reasonable, based their testimony upon the fact that the contest, and all the work of the contest, was included; and not one of them ventured to say that $3,500 would have been a fair fee for the administration alone; while the witnesses for the plaintiff place the value of the services, including both administration and contest, at a much less sum. It appears that the rules fixed by the Bar Association placed the attorneys' fees at one half of the amount allowed the executors.

Judge Cleeton, himself, testified:

"Q. Do you know what the Bar Association rule is (as to fixing attorneys' fees for executors)?

"A. No. I think they allowed the attorney about one half of what the administrator is supposed to get."

As the Bar Association is composed entirely of lawyers, I think we may safely assume that the fee fixed

by them is a reasonable one, and not too low. It is true that some of the attorneys who were witnesses, were disposed to quarrel with the schedule fixed by the Bar Association—basing their judgment upon the ground that such a division was unfair, because the attorney generally did all the work. This may be true as between the attorney and the executor, but that is no reason why the *estate* should suffer a double charge. If the executor puts the work that properly belongs to him on to the attorney, and the attorney does it, the executor should pay for such services *out of his fees*, and not out of the estate. The law allows the executor so much for the performance of his duties; and it would be exceedingly unjust, to permit him to collect the whole amount of his fees for performing such duties, and then turn the work over to an attorney, and let the attorney charge up the estate *again* therefor. The attorney should only be allowed for merely legal services.

In this case the estate was a very simple one. It was nearly all in money and real estate, except one large note. The real estate was not sold. The note was not sued upon for recovery. Outside of the contest with the widow, there were no complications whatever. There was no more work about the administration than there would be about the ordinary $500 estate. There was nothing that required any particular or special skill or unusual ability. There was no responsibility for the investigation of title or the sale of property. There was only the petitions to draw, and one or two accounts and the final account to prepare, and perhaps a few other incidental services. The entire work of settling the estate, if put together, would not have taken two weeks of the time of any attorney. Under such conditions the fees fixed by the

Bar Association would seem to be entirely ample, and, as I have said, it seems impossible to have reasonably stretched those small services to cover the $3,500 charge, without including the entire services in the contest matter; and, as we have seen from the testimony, as a matter of fact, they were included.

It has been urged that this contest was the individual matter of Mr. Kunkel, and that, therefore, the services of the defendants in that regard, were not properly chargeable to the estate. This seems an exceedingly narrow and technical view, and I do not think it can be sustained. The very right of the executors to be executors at all, was involved in the contest, and as attorneys for the executors, and on behalf of the estate, the attorneys were bound to do *everything that could be done* and make every exertion in their power, to sustain the will. But in any event, *it does not lie in the mouths of the defendants,* to say now, that their services in that contest, were not for the estate and properly paid for by the estate. According to the testimony of both Judge Cleeton and Judge Cake, already quoted, they went before the County Court and asked to be allowed this fee for *their services as attorneys in the contest,* and it was allowed to them upon their own solicitations and representations.

Indeed, it appears that the final report of the executors, which we may assume was prepared by the defendants, contains the following representations in regard to the services which the fee was to cover:

"In addition to which the executors have employed the firm of Bernstein & Cohen as their attorneys, who have acted as such since the probate of the will, and also have given special and additional services in the contest filed by the widow of deceased, *and the settlement of the same, for which services* they request that the attorneys' fees be fixed at $3,500."

They ought not now be permitted to come back and say the fee was not properly allowed in the County Court, and having got it down in their pockets, ask to collect it *again*, directly from Mr. Kunkel, who has already paid it once indirectly.

The only remaining question then upon this branch of the case is, whether the comparatively small services that were left, after taking out the contest and the estate already paid for, were fairly worth so large a sum as $3,500. No doubt there were some services performed by the defendants for Mr. Kunkel individually and which were not paid for through the executors. Such services were the correspondence, the transmitting of the money and the formal appearance for him in the contest. To say that such services were worth so large a sum as $3,500 seems to me so startlingly unjust as to be almost absurd.

Then it must be remembered that even these services are to be divided, because Hesse was employed by the defendants themselves, to perform part, if not all, of the same; and for this they paid him $1,000, not out of their own but out of Mr. Kunkel's funds. It must be presumed that he performed, at least a part of the work involved in the correspondence, and whatever else there was to do. Mr. Bernstein himself, in one of his letters to Kunkel, says: "That Hesse was employed to assist in the correspondence and as an attorney in the case," so that in ascertaining what was the value of the services performed for Mr. Kunkel, we must take out that portion presumably performed by Mr. Hesse. To allow the defendants to collect for the same services once for Hesse, and again for themselves, would be manifestly unjust. To my mind, therefore, a fee of $3,500 to be collected by the defendants from Kunkel, in addition to the $3,500

already received through the executors, and the $1,000 collected by them for Hesse, is clearly unreasonable.

In arriving at this conclusion I have said nothing about the $1,000 gift. That stands a little different from the other matters already considered. Nevertheless, it had some bearing upon the general relations of the parties. No doubt it was intended as in some sense a partial remuneration for the services performed by the defendants. Mr. Kunkel does not seem to have known the defendants at all, and there was no reason why he should have given them a thousand dollar Christmas present, except that he had so intended it. The defendants in their letters to him had constantly asserted and protested their unselfish and undying devotion to his interest.

In the letter of March 3, 1914, Mr. Bernstein says:

"You can rest assured we shall look after your interest to the best of our ability, and that it shall always be our aim to represent your welfare and interest most energetically."

In the letter of March 30th, ensuing, he says again:

"*Rest assured* that we shall look after your interests to the best of our ability, and that we understand your position perfectly."

In the letter of February 23d:

"You can *rest assured* that we shall keep you forthwith *informed as to all developments in this estate, which concern your personal interests.*"

In the letter of July 2d:

"On account of the intimate friendship always existing between your brother and us for a lifetime, and on account of the exceptional confidence which we enjoyed, it will be to a certain extent our duty to your deceased brother to see to it that his estate is administered, etc."

If Mr. Kunkel had been a reader of our own Shakespeare, he might have thought with old Falstaff, that the defendants "did protest too much," but as it was, he seems to have been very much impressed by these protestations, and he evidently thought that such unselfish and professed devotion to his interest, deserved some special reward. Perhaps he had read of the old time English law, when an attorney could charge no fee, and intended this $1,000 as a sort of honorarium. Perhaps he thought if he was generous with the defendants, they would at least be fair with him. Perhaps in his innocence he thought he could "bribe" them to do what was fair and right.

At any rate, it is perfectly plain that while he called the $1,000 a gift, he really intended that it should be some sort of a reward for the services which he hoped to receive from the defendants. As I have already said, it seems to me that from any viewpoint, the charge of $3,500 for the small services which the defendants performed individually for Kunkel, and for which they had not been paid, after already receiving $3,500 from the executors, is exorbitant and unfair.

It is urged in the brief by the learned attorneys for appellants, that if this money had been collected and transmitted through the German consulate, the charges for consulate fees and attorney's fees, would have been as large as those made by the defendants for the same services. It seems a poor defense to a bad act or an exorbitant fee that someone else would have committed as great a wrong or charged as unjust a fee. But since it throws a sidelight on this transaction, let us inquire. In the brief of appellants a calculation is made from which it is figured that the charges of 2 per cent by the consul and 5 per cent for attorney's fee would have amounted to something

over $3,900, and the result of this calculation seems to have been accepted bodily in the majority opinion.

But this conclusion, as it seems to me, can only be reached by disregarding the evidence, and figuring the percentage on the amount of the promissory note, which was transmitted without collection, as well as the money collected and transmitted. As a matter of fact the evidence shows this would not have been done.

Mr. F. H. Ritters, secretary to the German consulate, testified in regard to the official tariffs for the remittance of money from this country to Germany, as follows:

"Q. Will you kindly state what the official tariff of fees for the remittance of money in the states is at the present and what the preceding tariff was, if there has been a change and to what years it applies?

"A. Since January 1, 1911, we are charging 2 per cent—yes, sir, 2 per cent of the *money* forwarded to the heirs. That means 2 per cent of the *moneys collected,* and after the attorneys' fees are deducted.

"Q. Before that, what was the schedule?

"A. One and two thirds per cent of the first $500 and one third per cent of each additional $100.

"Q. How far back did that schedule apply?

"A. From 1872."

Mr. Veazie, who was attorney for the German consulate at that time, testified:

"Yes, sir; there are fees charged for the transmittal of money, for the actual money transmitted.

"Q. For the money actually transmitted?

"A. Yes, sir.

"Q. Do you know what that fee is approximately?

"A. *Two per cent on the money actually transmitted.*

"Q. And the consul, did he get anything out of these estates, or any of them? The consul here?

"A. Not a cent, no, sir. The consul here was an honorary consul, serving absolutely without pay or fees. * *

"Q. *Would these charges of fees in a case of this kind, for instance, where there was $25 or $26,000* in *cash, and $27,000, or such a matter, in securities, would that fee be charged on the securities as well as on the cash?*

"A. *No. No fee is charged excepting on the cash actually transmitted.*"

And he testified further in regard to the attorneys' fees.

"A. The standard fee charged in cases where we have handled the business of an estate, including attention to it during administration and drawing the necessary proofs and documents in the case, and doing all that is necessary, is 10 per cent on the first $1,000 and 5 per cent on the balance. * * But in cases where there is a will and no proofs are required and no special services are needed, we usually have made a much lower charge than that, varying with the amount of services required."

This is the only testimony in the case upon this point; so it is perfectly clear that the charges of two per cent for consulate fees, and five per cent for attorney's fees, would only have been on the cash transmitted, which amounts in this case in round numbers to $28,600, including what was retained by the attorneys. The note was never collected, and there was nothing to be done in regard to it, and nothing could be done, except to receive it from the executors and put it in a letter directed to Samuel Kunkel, and deposit it either in the postoffice or in the express office.

To suppose that either the German consul or the attorneys for him, or any other reputable attorney, would charge 2 per cent or 5 per cent on the amount of a note for $27,500 for the nominal service of taking it to the postoffice, is as contrary to every presumption of honesty and fair dealing, as it is to the posi-

tive testimony in the case. So, as a matter of fact, the maximum charge, if this matter had gone through the hands of the German consul instead of defendants, both for consulate fees and attorney's fees, would have been figured like this:

Consulate fees of 2% on $27,000	$ 552.00
Attorney's fees of 10% on first $1,000	100.00
Attorney's fees of 5% on remaining $27,600	1,380.00
Total	$2,032.00

Even this charge would have seemed an exorbitant one for the services performed. And, indeed as we have seen, Mr. Veazie testified that in cases where there is a will, there was usually a much lower charge. But when we consider that these services would have covered everything the defendants did for Mr. Kunkel, that they were not paid for through the executors, and that it would also have covered the services for which the defendants paid Hesse $1,000, it is apparent that the defendants' charge for doing the same work, for themselves and Hesse, was more than double what Mr. Kunkel would have paid, if the matter had been attended to through the regular official channels. So the comparison stands in round numbers, $4,500 against $2,000.

Also it must be remembered, the attorneys thus acting for Mr. Kunkel, would not have been tied up with the executors and would have (presuming that they were honest), *in addition to all the services performed by the defendants,* gone before the County Court and objected to the fees charged by the executors on the false appraisement and on the real property that was never sold, and it may fairly be presumed would have succeeded in reducing the charges of the executors by at least $200.

Again, they probably would have succeeded in reducing the attorney's fees to some approximation of the standard fixed by the Bar Association. So that Mr. Kunkel, besides the difference of $2,500, in the amount of fees, which he would have had to pay directly, would also, in all reasonable probability, have saved from $200 to $1,200, by reason of having independent attorneys, who would have represented him before the County Court in the matter of the final account.

The only remaining question is, whether or not the defendants, having driven a hard bargain with Kunkel, and induced him to tacitly, at least, assent to this charge, can now successfully "demand their pound of flesh," and insist upon their hard bargain because of that assent. Here we are met by the principle enunciated in the beginning of the majority opinion, and in the quotation from Thornton on Attorneys, already alluded to.

The defendants were attorneys. They were dealing with a client, and a client, who, by reason of age and distance, was more than ordinarily helpless and at their mercy—more than ordinarily dependent upon them for good faith, fair dealing, information and advice. Then, if we are to follow the accepted and announced rule governing the relation of attorney and client, the defendants, in obtaining Kunkel's assent and approval of their fee and his agreement thereto, should have exercised the *utmost* fairness and good faith and should, in the language of Judge Thornton, have disclosed "*all information* in their possession as to facts which *would or might influence him.*" And if they did not do so, his supposed assent falls to the ground and comes to naught.

The question then is: Did they deal with him, with the *highest* degree *of fairness?* Did they disclose to him fully, *all* information which was in their possession, which *would* or *might* influence him? Did they communicate to him all the information which they would and should have communicated to him if they had been strangers to a transaction between him and third parties, and about which he was consulting them. We think the contrary is clear to all. The very day before they wrote to him, asking for his assent to the charge against him individually of $3,500, they had received from funds belonging to him, through the executors another $3,500 for their supposed services in his behalf, through the estate. This matter was then fresh in their minds. They could not have forgotten it. Yet they do not say in their letter to him one word, or inform him in any way, in regard to the previous charge. Neither did they tell him that they had claimed from the executors, and been paid by them, for their services in the contest matter. Why this silence, about a matter so nearly and vitally touching Mr. Kunkel's interests, and so inseparably related to the fairness of the additional fee they were asking him to agree to? Was it not a matter about which he had a right to know? Was he to be kept in complete ignorance of what had become of so large a sum of his money?

We may find an excuse, perhaps, if we will, for their failure to send him a copy of the different accounts, showing just how the estate stood, and dismiss it as merely 'imprudent.' But here was a single large item amounting in one disbursement to thousands of dollars. And it was *paid to and received by them.* Can anyone excuse their failure to inform their principal in relation to such a charge, under such circum-

stances? Even if they had not been asking for another and further fee, it would surely have been their duty, as attorneys and agents of Mr. Kunkel, to give him information of so large a charge against him. And was it not all the more their duty, when they were asking him to agree to a *still further fee?*

They had solemnly promised in their letter of February 23d,

"*You can rest assured that we shall keep you forthwith informed of all developments in this estate which concern your interests.*"

Independent of the promise, it was their bounden duty to give the information, or else all our fair words about the duties of an attorney go for naught. Was it "fair" to Kunkel to get him to agree to another fee of $3,500, without first telling him that they had already received, the day before, a big fee of a like amount, paid through the executors and also out of *his funds*, and that this fee covered their services in the contest with Mrs. Kunkel, and in the settlement of that contest? Was there a compliance with the rule announced by this court that "the conduct of an attorney when dealing with his client shall be characterized by *fairness*," and that the burden "is on the attorney to show such fairness?" Was this giving him "*all the information* which it would have been their duty to give, if they themselves had not been interested"?

Was this a compliance with the rule stated by Mr. Thornton already quoted, that attorneys are required in such matters to "exercise the *highest order* of good faith in disclosing *all information which would or might influence*" the client? Can anyone logically say, that it would not and might not have influenced

old Mr. Kunkel in concluding whether he would assent to this large fee, if he had been informed that the defendants had already received from his funds another fee equally large? Do not the conditions and circumstances drive one irresistibly to the conclusion, that the very reason why the appellants did not inform their client of the first $3,500 fee, was because they *feared* that the old gentleman *would* take it into consideration, and *would not be so willing to pay them the second $3,500*, and the $1,000 for Hesse, if he was informed that they had received the first fee?

It must be remembered that the defendants were just as careful, apparently, to not inform the County Court, when they were asking for a fee from it, that they expected another fee from Kunkel, for the same services, or that part of the services were to be performed by Hesse at Kunkel's expense, as they were not to inform Kunkel of the fee received from the County Court. It must be conceded by everyone that rightly or wrongly, justly or unjustly, legitimately or illegitimately, the appellants had their hands down deep in both Mr. Kunkel's pockets. With one hand they were taking $3,500 from one pocket through the executors, and with the other they were extracting $3,500, yes $4,500, through the individual charge. And they were carefully obeying the biblical injunction, "Do not let thy right hand know what thy left hand doeth."

It is urged in the brief on behalf of defendants, that the court should assume that these facts were actually known to Kunkel at the time he assented to the $3,500 individual fee, through other sources; but I cannot assent to this view. The burden was upon the defendants to show definitely that Kunkel did know these facts. The evidence tends strongly to show affirma-

tively that he did not have such knowledge. In the letter of December 14, 1914, in which he assents to the $3,500, he says:

"With your balance I am completely agreed and satisfied. *Have the executors been paid,* or do both gentlemen live in such good circumstances that they do not request any administrators' fees?"

So it is apparent that Mr. Kunkel did not know at that time that fees had been allowed, even to the executors, and it is not to be supposed that he knew of the $3,500 allowed to the executors *for their attorneys,* because, had he known, he would certainly have mentioned it in that letter. Under these circumstances it was natural that he should suppose the $3,500, which he was paying, covered the entire services of the defendants, in the absence of any statement from them that they were getting any other pay. I think his assent under these conditions to the payment of the additional $3,500 should be disregarded.

While it is practically admitted that the defendants did not inform Kunkel that a fee of $3,500 had been allowed and paid by the executors, or that this fee covered their services in the contest proceeding; yet it is strongly urged, that because the defendants had, in letters to Kunkel some months before the final settlement, informed him that there would be a fee from the executors; that that, was a sufficient fulfillment of their duty, to give him *full* and *complete* information of *everything* within their knowledge; and that it was, therefore, unnecessary for them to inform him that the fee had actually been allowed, or of its large amount, or that it covered the services in the contest and compromise.

But even if we assume that old Mr. Kunkel carried all the details of the voluminous correspondence of

months before in his mind, and therefore remembered, when he received the letter of November 19th and answered the same, that a fee as attorneys for the executors had been mentioned, yet it did not give him the slightest knowledge of the important things—the *large size* of the fee already received, and the fact that *it covered defendants' services in the contest and settlement,* and therefore made any second charge to him for these matters, a double charge. Allowing for every item of information the defendants had given him, and assuming that he remembered it with the utmost clearness, it would only tell him that the defendants expected to receive *some* fee from the executors—whether that fee would be $100 or $500, and whether it would be confined to the conventional details of the estate—or would include their services in the contest and settlement, he was in no way informed.

If he had been acquainted with the practice of lawyers in this country and the rules of our Bar Association, he would probably have figured that such a fee in the estate matter would be about $1,000. But he had no knowledge of such things, and if he thought about it at all, he would probably expect it to be a much smaller sum. Certainly he would never imagine it would be so vast a sum as $3,500 in addition to the $3,500 they were charging him directly for services in the same matter. When they had written him the previous letters they did not know and could not state the amount of their fees from the executors, although they might *have given an approximation.* But when they wrote the letter of November 19th, *they knew exactly what they had received and that it covered the contest and settlement.*

Why, then, did they not communicate that information to their client, when they were asking him for this

other large fee? Was not theirs, at best, a poor and shabby pretense of performance, of the duty, which we have just declared rested upon them as attorneys to *fully* inform their client of *every* fact in their possession which *might* influence his judgment?

If Kunkel and the defendants had been strangers, dealing at arm's-length, such fragments of information might possibly be accepted as giving Kunkel notice that *some* fee was to be charged. But here they were not dealing at arm's-length. They were dealing with an *old man* thousands of miles away and he was *their client*. He was utterly dependent upon their good faith. If that were possible, they had added to their duty as attorneys by frequently protesting their entire devotion to his interests. By their promises and assurances they had won his complete confidence. Under such circumstances, they should not now be permitted to stand upon any technical doctrine of "notice" or upon any half disclosures, which left their client in the dark as to the most important elements.

It is said the defendants told Kunkel *three times* in the course of their long correspondence, that they would charge him "some fee" through the executors. But they did not tell him *once* that such fee had been actually received. They did not tell him *once* that it amounted or would amount to thousands of dollars. They did not tell him *once* that it covered the contest and settlement.

It is also urged that Mr. Kunkel knew the amount of the estate, and knew the amount he was to receive, and that, therefore, he could figure out in some way, the things which he had a right to know; and it is suggested that he was a "schoolmaster," and therefore must be presumed capable to do this figuring and protect himself. But it must be remembered that

while he had been a teacher, he was at the time of these events, a superannuated one. He was an old man and apparently childish, as one at such an age would naturally be. He had reached the age of 78 years—had passed the three score and ten allotted to man, and was approaching close to the four score which some men reach "by reason of their great strength." He was suffering with the troubles and afflictions of such great age. He had lost his wife and was sick himself, during the very happening of these events.

It is true that "schoolmasters" are presumptively intelligent, but they are not all like Goldsmith's village teacher, who amazed the gazing rustics "That one small head, could carry all he knew." Generally, they lead simple lives, and come in contact mostly with children and inexperienced youth; generally they know little of business affairs, and especially of lawsuits, and the settlement of estates. Kunkel, in particular, knew nothing of American lawyers, or their charges, or of the methods here of probating estates. In these matters he would have been no even matcher of wits with the defendants, even at his best. At his advanced age he was as helpless in their hands, in such matters, as they would have been, no doubt, in a discussion with him over Greek verbs or Latin translations.

Besides, he would have had to be possessed of the uncanny deductive powers of a Sherlock Holmes, to have reached any conclusion from the information he had as to whether or not the defendants had actually received a fee from the executors, or how much it was if they had received one, or that it covered the services in the contest and settlement. It is true he knew (from others) the appraised assets of the estate, and

that he might have been able, from the information which had been given him, to figure the total amount that had been disbursed. But that gave him no light upon the *justness or injustice of the fee the defendants were then demanding.* He was not informed, and he could not tell, how much of this total disbursement had gone for taxes, or inheritance taxes, or for other legitimate purposes; or whether any part of it had gone to defendants for a fee.

The defendants, being his attorneys, and having won his confidence by their repeated assurances, he naturally assumed that *all* of the disbursements were legitimate. He had absolutely no way of calculating that $3,500 of the total disbursements had already gone into the defendants' pockets, when they were asking him for another fee of like amount, and $1,000 more for Hesse. The language of the defendants in making the charge for the additional fee was indefinite and equivocal.

"For the professional services of Messrs. Bernstein & Cohen, which have been rendered for you to date, I charge the sum of $3,500."

There was nothing in this language to indicate *what* services they were charging for, or whether or not they were charging him for the contest and settlement—nothing to distinguish between the services performed for him directly, and those performed for him through the estate. It must be remembered that everything they did in any capacity (except fixing the fees for themselves and the executors) was "rendered for him," since he was the only one to benefit, and it was all to be paid for out of his funds.

It did not make the slightest difference to Kunkel, or from his standpoint, whether the fees came in in the shape of one fee or two, provided that the total

was reasonable and just. He knew that whatever the defendants received would come out of his pocket anyway, whether they were paid directly or through the executors. When he received their bill in this indefinite shape—*without any reference to any other charge*—he would, naturally, from his standpoint, suppose that their bill had been consolidated, and covered all their services. The large amount of their charge, which must have seemed to him ample to cover their entire services, would naturally strengthen that supposition. That he did so conclude, is plain from his answering letter, in which he says *nothing about any other fee to them,* but wonders and inquires why the executors *are not charging any fee.*

"Do the two gentlemen, Mr. Scheller and Mr. Wagner, live in such good circumstances that they do not claim any executors' fees?"

The old man had a perfect right to assume that if the defendants had already received a fee—certainly if they had received a large fee—out of funds belonging to him, that they would inform him of the fact; and to infer that they *had not,* when he received no such information. How easy—*and how natural*—it would have been, if Mr. Bernstein wanted to be entirely fair, for him to have written instead of the indefinite and equivocal letter he did write—something like this:

"For the professional services of Messrs. Bernstein & Cohen to you *individually* I charge the sum of $3.500. *This does not include our services to the estate nor in the contest and settlement with Mrs. Kunkel, for which we yesterday received through the executors, an additional $3,500.*"

If they had done this, or anything similar, they would have been fair—*and no more than fair*—with their client. Kunkel could then have intelligently as-

sented to or rejected their proposition. They would then have complied with the rule laid down by this court in the majority opinion, and observed that *"high degree of fairness"* which is said to rest upon attorneys, and under which, before they deal with a client, they must *fully* disclose *every* fact which *might* enter into his decision.

The services performed by the defendant for Mr. Kunkel individually, and for which the defendants have not been paid, as I view it, are the transmitting of the money, the correspondence with Kunkel and the formal appearance for him in the contest proceeding. These services were not exceedingly great, and I think $1,000, in addition to the $1,000 received by Hesse, would be full and ample compensation therefor. I think the judgment of the court below should be modified by allowing defendants for the value of such services and as thus modified, affirmed. This is the only conclusion which seems to me possible from a close analysis of the case.

It is suggested that this conclusion would be in the nature of a compromise and therefore should not be entertained, but I do not see that it involves a compromise in any obnoxious sense. The compromise abhorred by the law, as I understand it, is one that attempts to split the difference between right and wrong, and run the line of cleavage halfway between justice and injustice. The line of real justice does not always measure the extreme claim of either party, but lies quite as often, somewhere between the two. And when this is so, and that just line can be ascertained, there is no impropriety in there fixing our decision, even although it may be in some broad sense in the nature of a compromise.

Here the defendants are justly entitled to the reasonable value of the services actually performed for Mr. Kunkel, and for which they have not been compensated, but as I view it they are not entitled to a dollar more, on account of the letter of a hard agreement, which they have obtained by suppression, either willful or negligent. When the whole transaction is taken up by the four corners and looked at from a broader view, the injustice of allowing the appellants the entire amount for which they ask, seems to me just as apparent as when closely analyzed. This estate was, as we have seen, a very simple one. There were no sales of real property and no recovery of money through litigation. The estate was in process of settlement for eight or nine months, but could have occupied only a few weeks of actual time. The only money really handled by the defendants was the $41,000 in the bank when Daniel Kunkel died. By the time this reached Samuel Kunkel it had shrunken in one way and another to about $23,000. Of this difference the defendants, and their associate Hesse, have absorbed and are attempting to absorb in one way and another, as compensation for their services, the sum of about $9,000. This is no small sum. It is a moderate fortune. As much as the average attorney earns in years—more than the average layman accumulates in a lifetime. To my mind this great sum is out of all proportion to the small services performed. An attorney ought not to expect to get rich off from one client for so little work and in so simple a transaction. And if he does, his methods in the matter ought to be so fair and open as to be above reproach. It may be true that there is no absolute standard by which we can measure the value of an attorney's services, as we would a bushel of wheat. But this is true of personal services in all

walks of life. It is just as true of the services of an architect or a physician or a mechanic, as it is of a lawyer. Yet we have to measure the value of such services whenever they come up to us. We all have an approximate idea of what is reasonable and what is unreasonable, for an attorney's services in any given case.

I concur with that portion of the majority opinion which approves the settlement with Mrs. Kunkel and finds that the defendants acted with entire good faith in that matter. I also agree that there is nothing to censure in their general management of the estate, except when it touched the fees of themselves and the executors.

It has been suggested that Mr. Kunkel might have approved of defendants' proposed fee, even if he had been informed of the previous one. It may possibly be true, that in the old man's improvident eagerness to secure a portion of his inheritance, he would have consented, even to that. We can never know—he is dead and cannot speak—but it is the fault of the defendants that we do not know. If they had done their duty and informed him of the first fee when they asked for the second, we would have known what his attitude would have been. It is not in the mouths of the defendants to urge the doubt that results from their own wrong or neglect. Under such circumstances, as we have already seen, the burden is upon them.

There are a number of reasons why I should like to concur in the majority opinion, if I could see my way clear to do so, without violation of just principles, but I cannot, and I therefore dissent.

Submitted on briefs at Pendleton May 5, affirmed June 10, 1919.

GRANT CHROME CO. *v.* MARKS.

(181 Pac. 345.)

Corporations—De Facto Corporations—Rights.

1. As between private parties, the right of a *de facto* corporation to act as a corporation cannot be questioned.

[As to *de facto* corporations, see note in 118 **Am. St. Rep.** 253.]

Corporations—De Facto Corporations.

2. Where there was an attempt in good faith to organize a corporation and the corporation proceeded to exercise corporate functions and elected corporate officers and expended large sums of money in operating and developing a mine, as a corporation, it was a *de facto* corporation, although the articles of incorporation were not filed in the office of the county clerk as required by law.

Appeal and Error—Issues in Lower Court—Defenses not Pleaded.

3. In an action by a lessee for a mine, defendant, who in framing his pleading stood entirely on denials of the allegations in plaintiff's complaint and on the single affirmative allegation that he was an innocent purchaser cannot on appeal take advantage of an affirmative allegation in the answer of the owner of the premises, from whom he had leased the mine, that the plaintiff had abandoned and forfeited his lease, the owner not appealing from a judgment in favor of plaintiff.

From Grant: DALTON BIGGS, Judge.

In Banc.

This is a suit in equity brought by the plaintiff, as a corporation, claiming to be the assignee of a certain lease and option contract, executed by the defendants, Marks and Thompson, for a Chrome iron mine in Grant County, Oregon.

The contract in question was originally executed on the twenty-third day of May, 1917, by the defendants, Marks and Thompson, to one Gustave Pinson, and is an agreement to sell for the price of $5,000, part of which purchase price is to be paid in the way of royalty of $2 per ton for the iron ore extracted. It also contains the following leasing provisions:

"That said lessors do hereby grant, demise and let unto the said lessee, his heirs, executors, administrators and *assigns,* for the term of *three years* from the date of the execution of this instrument, the aforesaid described mining property. * *

"To have and to hold unto the said lessee for the aforesaid term of three years, unless sooner forfeited or determined for any cause, or for any breach of any covenant herein set forth. * *

"In consideration of such demise the said lessee doth covenant and agree with said lessors to enter immediately upon said mine or premises, and work the same mine fashion in manner necessary to good and economic mining, so as to take out the greatest amount of ore possible, and not less than —— tons annually * * and pay the aforesaid royalty upon the delivery of the ore at the railway station at Prairie City, Oregon; all of the ore to be extracted from said premises and deliver the same, as aforesaid, with all convenient speed in lots as mined."

On the eighteenth day of June, 1917, Pinson executed an instrument purporting to convey the aforesaid lease and option to the plaintiff herein. After the execution of this assignment one O. C. Irwin, claiming to act as president and manager of the plaintiff company, took possession of the mine in question, and proceeded to develop and operate the same for several months, expending, as the testimony on behalf of plaintiff tends to show, about $8,000 upon this work. About the 1st of September, being unable to market the ore, the work was discontinued, and Irwin left the mine and proceeded East, to try to negotiate a market for the ore. The tools were first left at the mine, but after a short time, some of them being stolen and carried away, the portable tools were taken and stored at the place of a neighbor living somewhere in the vicinity.

The defendants, Marks and Thompson, seem to have become dissatisfied with the way the plaintiff was proceeding, and made another lease on the same property to the defendant Tarnow, who went into possession, and was in possession of the mine, at the time of the commencement of this suit.

The defendants, Marks and Thompson, after denying in their answer the incorporation of the plaintiff, and most of the other allegations of the complaint, proceeded to allege affirmatively in substance, that Pinson and those representing him under the contract, had forfeited and abandoned their right to the mine, by failing to comply with the conditions of the contract, and by going away and leaving the mine.

The defendant, Tarnow, also answered and after making substantially the same denials as the other defendants, alleged affirmatively that he was an innocent purchaser, leasing the property without notice of plaintiff's claim, but *does not allege abandonment or forfeiture of the lease.*

There was a decree in the court below in favor of plaintiff and against all of the defendants. From this decree the defendant Tarnow appeals. The defendants, Marks and Thompson, do not appeal.

AFFIRMED.

For appellant there was a brief submitted over the names of *Mr. J. Thorburn Ross* and *Mr. John L. Rand.*

For respondent there was a brief submitted over the names of *Mr. J. W. Biggs* and *Mr. George H. Cattanach.*

For defendants J. D. Marks and W. K. Thompson there was a brief submitted by *Mr. A. D. Leedy.*

BENNETT, J.—There are only two questions presented in the briefs. First: Whether or not the plaintiff sufficiently established the fact that it was a corporation, authorized to accept the assignment of the lease from Pinson, and (second) whether or not there was such a forfeiture and abandonment of the lease established by the defendants, as destroyed the rights of the plaintiff thereunder.

On the eighteenth day of June, 1917, Irwin, Dugdale and Pinson executed the articles of incorporation, but these articles were not acknowledged until the succeeding 11th of July, and a copy of the same was not filed with the corporation commissioner of the state until the thirteenth day of the same month; and a copy never was filed in the office of the county clerk of Grant County, as required by law.

Nevertheless, on the same day the articles of incorporation were executed, the stock of the corporation was subscribed for by Irwin, Dugdale and Pinson, and they proceeded to organize the company by electing directors, president, vice-president, secretary, treasurer, etc.

1, 2. It is not now claimed by the plaintiff that the corporation was sufficiently organized to become a corporation *de jure;* but it is claimed that sufficient had been done to make it a corporation *de facto*, and that between private parties its right to act as a corporation cannot be questioned.

In 1 Thompson on Corporations, Section 229, it is said that the essential elements of a corporation *de facto* are:

"(1) A law or charter providing for the organization of corporations of the kind attempted to be organized; (2) an attempted good-faith compliance with the statutory requirements intended as conditions pre-

cedent to corporate existence; (3) an unintentional omission of some legal requirement; (4) the exercise in good faith of corporate functions."

And, again, in Section 234, it is said:

"But in the nature of the case, and under the definition given, if some step in the progress of the organization is unintentionally omitted, and the other requirements are present, there will be a corporation *de facto*. The accidental failure to comply with some legal requirement, is one of the elements of the corporate existence *de facto*, otherwise, it would be a corporation *de jure*. A very common omission of strict or substantial compliance is found in the failure *either to properly execute, acknowledge or record the certificate of incorporation or articles of association*. The general rule is that the mere failure to properly execute and acknowledge the certificate, or the failure to record the certificate of articles of association, will not be fatal to the existence of a corporation *de facto*."

To the same effect is 1 Fletcher Cyc. of Corporations, Section 278, and our own state decisions follow this doctrine: *Marsters* v. *Umpqua Oil Co.*, 49 Or. 374 (90 Pac. 151, 12 L. R. A. (N. S.) 825); *Splonskofsky* v. *Minto*, 62 Or. 560 (126 Pac. 15); *Alder Slope Ditch Co.* v. *Moonshine Ditch Co.*, 90 Or. 385 (176 Pac. 593).

In the case at bar the law unquestionably authorizes the creation of such a corporation; there was an attempt, apparently in good faith, to organize the corporation, and the corporation proceeded to exercise corporate functions. The evidence shows that it elected corporate officers, took over the contract for the lease of the mine, and expended large sums of money in operating and developing the mine, all ostensibly as a corporation.

Miller and Kimball, two witnesses called by the defendants, testified that they were working for the "Grant Chrome Co." and it must have been generally

understood that Irwin represented that company in his operations at the mine.

Under such conditions it seems that the rule in regard to *de facto* corporations applies, and that the plaintiff had sufficiently established it was such a corporation.

3. As to the question of abandonment and forfeiture by the plaintiff, the appellant Tarnow does not seem to be in a position to raise these questions.

In framing his own pleading he saw fit to stand entirely upon his denials of the allegations in plaintiff's complaint, and upon the single affirmative allegation that he was an innocent purchaser in good faith.

There was no allegation in his answer of any abandonment on the part of plaintiff, or of any failure to comply with the conditions of the contract. The defendants, Marks and Thompson, who did raise this question in their answer, do not appeal; and we think appellant cannot take advantage here of affirmative allegations in their answer, which were not in his own. If he had desired to raise these questions he should have pleaded the fact upon which such a claim could be based.

The instrument executed by Marks and Thompson was a lease for a definite period, as well as an option, and as it did not contain any express provision for a forfeiture, it may be doubted whether such a forfeiture could be enforced, even if Marks and Thompson were appealing: 2 Taylor on Landlord & Tenant, § 489; 2 Tiffany on Landlord & Tenant, § 193; 27 Cyc. 708. But this question we do not find it necessary to decide.

As to appellant's claim that he was an innocent purchaser, we think that cannot be sustained under the evidence. Both Marks and Thompson testified that he

was shown the lease before he made his lease, and substantially knew all about the transaction.

Having notice and knowledge, therefore, of the fact that the lease had been executed, and not having pleaded any forfeiture or abandonment, or failure to comply with the terms of the lease, we think he has failed to sustain his only affirmative defense.

The judgment of the court below is affirmed.

AFFIRMED.

Argued at Pendleton May 6, affirmed June 10, 1919.

STATE v. MOSS.

(181 Pac. 347.)

Criminal Law—Dismissal of Indictment—Failure to Try Case at Following Term.

1. Assuming that district attorney, in an interview with defendant's attorney, made oral agreement that cases should be continued from October to April term, and should then be dismissed, and that district attorney violated the agreement, it would not be a sufficient ground for dismissal of indictments under Section 1701, L. O. L., as to indictment being dismissed, where defendant is not tried at next term of court, in view of Article I, Section 10, of the Constitution, providing that justice shall be administered openly and without purchase.

Criminal Law—Dismissal for Delay—Review.

2. Since the trial court had personal knowledge of all the proceedings, his ruling, denying motion to dismiss indictment for failure to try case at next term of court, is entitled to some weight on appeal.

Criminal Law—Dismissal of Indictment—Failure to Try Case at Following Term.

3. Where cases were continued from the October to April term with express consent and approval of defendant, and defendant, though present, did not demand a trial at the April term, and at the next October term withdrew motions then made to dismiss because the case was not tried at the April term, defendant's motions to dismiss, thereafter made, do not come within Section 1701, L. O. L., or Article I, Section 10, of the Constitution.

[As to waiver of right to be discharged, see note in 85 Am. St. Rep. 197.]

Criminal Law—Dismissal of Case—Waiver of Grounds.

4. In legal effect defendant's withdrawal of motion to dismiss, with the statement in open court that he was ready for trial, and his application and consent to have the cases set for trial, constituted waiver of his right thereafter to insist upon motion to dismiss the indictments.

From Harney: DALTON BIGGS, Judge.

In Banc.

On September 27, 1917, at a continuation of the April term of the Circuit Court for Harney County the grand jury returned four indictments against the defendant, the first of which charged him with the larceny of a steer, the property of Pacific Live Stock Company; the second, with the larceny of a mule, the joint property of William Hanley Company and Eastern Oregon Live Stock Company; the third, with the larceny of one steer and four cows, the property of William Hanley Company; and the fourth, with the larceny of six cows belonging to Eastern Oregon Live Stock Company. To each indictment the defendant waived time, pleaded not guilty and announced himself ready for trial for the larceny of the cattle, but on account of the absence of material witnesses from the state moved for and was granted a continuance on the indictment for the larceny of the mule. The state elected to try the defendant for the larceny of the steer belonging to Pacific Live Stock Company and after trial, on October 6, 1917, the jury returned a verdict of not guilty on that charge. By the following order of the court the remaining cases were continued for the term:

"It is ordered that the above-entitled cause and each thereof wherein W. Z. Moss is under indictment, be continued for the term; that the defendant be permitted to go on his recognizance and his cash bail be remitted in all cases except that of indictment for larceny of one mule; that in the last mentioned case a

personal bond for $1,000 may be at any time substituted for the cash bond of $500."

At that time the terms of the Circuit Court were held on the first Monday in April and the first Monday in October. On October 7, 1918, the defendant through his attorneys, W. Lair Thompson and P. J. Gallagher, filed a motion to dismiss the charges against him, "for the reason that the said indictments were not called for trial at the next term of the court following the filing of the said indictments and that the said trial thereof was not postponed on the application of the said defendant." On the same day the court made an order setting the hearing of the motion for 1:30 P. M. At that time the defendant through his attorneys, P. J. Gallagher and George S. Sizemore, appeared and the court then made the following order:

"Now at this time this matter coming on to be heard upon the motion of the defendant, filed this morning, asking that the indictments be dismissed, for the reason that the said indictments were not called for trial at the next term of the court following the filing of the said indictments, the said defendant appearing in person, as well as by P. J. Gallagher and Geo. S. Sizemore, his attorneys, said defendant, at this time, asks leave to withdraw the said motion to dismiss, and leave to withdraw being granted, the said defendant, through his said attorneys stated in open court that he was ready for trial and asked that the said cases be set for trial.

"Whereupon, at the application of the defendant and with his consent, the said cases, and each thereof, were set for trial Monday, October 14, 1918, at the hour of 10:00 o'clock in the forenoon."

On October 15, 1918, the defendant through W. Lair Thompson, his attorney, filed another motion with the latter's supporting affidavit to dismiss, for the reason that:

"Said indictment was found on the twenty-seventh day of September, 1917; that the trial hereof was continued upon the condition that said indictment would be dismissed in April, 1918, and there was no further continuance of said cause, and the trial thereof was not postponed at the April, 1918, term of this court with the consent of or upon the application of this defendant, nor was any order passed by the above-entitled court continuing said cause at the April, 1918, term of this court, and this defendant was not brought to trial at the April, 1918, term of this court upon said indictment.

"This motion is based upon the records and files in this cause, and upon the affidavit of W. Lair Thompson filed herein to-day."

To this motion counter-affidavits were filed by M. A. Biggs, district attorney, and W. A. Goodman, sheriff of Harney County.

It appears from the affidavit of Mr. Thompson that after the trial and acquittal on the indictment for the larceny of the steer belonging to Pacific Live Stock Company, the district attorney sought an interview at the Hotel Levens at Burns, and the following conversation took place:

"The district attorney * * said to affiant, 'What do you want to do with the other Moss indictments?' to which affiant replied, 'I want to either try them immediately or have them dismissed, and of course I would rather have them dismissed'; the said district attorney then said, 'I know when I am licked, and if you insist upon trying those cases now I will have to dismiss them, but that would subject me to criticism because of the large expense the people of Harney County have been put to in these matters, and I would like to protect myself, it would let me down easier if the cases were continued until next spring and then dismissed when people generally were not discussing (or had forgotten) the matter. If you will agree to a continuance for the term, I will dismiss all of the Moss cases

(and certain other cases not here involved) when court convenes in April, except the mule case, which I want to try.' Thereupon affiant said, 'And in the meantime how about Moss' bonds? He has a large amount of cash bail on deposit; would you be willing to release this and let Moss go on his own recognizance?' To which the district attorney answered, 'Yes, I would be willing to release all bail money except in the mule case, and in that case I would be willing to recommend either $500 cash bail or a $1,000 personal bond.' "

After further discussion, the conversation was as follows:

" 'Now, let us have no misunderstanding about this matter; this is a gentlemen's agreement made off the record to protect you; the Moss bail money is to be released and he is to go on his own recognizance in all except the mule case, and in that case he may leave on deposit $500 cash bail, or substitute a $1,000 personal bond; when court convenes next April to make up the trial docket, you will move to dismiss all indictments except in the mule case without the necessity of my coming to Burns; I would not consent to a continuance if it would necessitate another expensive trip out here.' Thereupon said district attorney said, 'Yes, that is the understanding and I will dismiss the cattle indictments next spring; you can tell the judge about it in the morning.' "

The affidavit continues as follows:

"On Monday, October 8, 1917, before court convened, this affiant did relate to Hon. Dalton Biggs, Judge of the above-entitled court, the substance of said agreement, and when court convened the district attorney and affiant in open court stated that an agreement had been reached to continue all of said indictments and for the reduction of bail in certain cases which were involved in said agreement, but to which said defendant Moss was not a party, and for said defendant Moss to go on his own recognizance under all indictments except that involving the mule here-

inabove mentioned, and for $500 cash bail or $1,000 personal bond in the mule case. Orders were so passed by this court and defendant's cash bail under all of said cattle indictments was returned to him. This affiant would never have agreed to a continuance of the above-entitled case except upon condition that the same be dismissed in the spring of 1918, as agreed upon as hereinabove set forth and did not agree to said continuance except upon said condition that the same be so dismissed."

In his counter-affidavit the district attorney says:

"That on the first day of the April term of the Circuit Court of Harney County, Oregon, for the year of 1918, the cases of the *State of Oregon* v. *W. Z. Moss* were called on the docket by the court and the said Moss appearing in person and by his attorney, P. J. Gallagher, and at said time some remarks were made and some discussion had as to what disposition would be made of said indictments and at said time the affiant herein as the district attorney for Harney County, Oregon, stated to the court in the presence of the defendant and his attorney, P. J. Gallagher, that attorney L. R. Webster, of Portland, Oregon, was associated with the district attorney in both of said cases and that the said affiant herein would not care to make any disposition of said cases until the said L. R. Webster should be in court. The affiant further stated at said time that he expected said L. R. Webster to be in attendance upon the court within a day or two. That during the first week of said term of court, the said L. R. Webster arrived in the city of Burns, Oregon, from Portland, Oregon, and was for several days in attendance upon court, but that before the arrival of the said L. R. Webster, the said defendant, W. Z. Moss, absented himself from court and left Harney County, Oregon, and as this affiant is informed and believes, returned to Lake County, Oregon. And that said defendant did not again appear before the court either in person or by his attorney, and that for that reason it was impossible for the district attorney to

have the case set down for trial or any other disposition made of the cases, owing to the absence of said defendant.

"That the said term of court remained open from the first Monday in April, 1918, until the first Monday in October, 1918; that during the said term of court and in the first week of September, 1918, this affiant caused the sheriff of Harney County, to notify the said defendant, W. Z. Moss, to appear before the Circuit Court on Tuesday, the first day of October, 1918, in order that said indictments might at said time be set for trial. That upon the failure and refusal of the said defendant to appear in court after having been so notified by the said sheriff to appear as aforesaid, this affiant applied to the judge of the above-entitled court and secured an order for a bench warrant requiring the sheriff of the county to produce the said defendant in court. That the sheriff was unable to apprehend the defendant at once and did not secure the attendance of the said defendant before the said Circuit Court until Monday, the seventh day of October, 1918, the same being the first day of the October term of court. That on Monday, the seventh day of October, 1918, the said defendant, W. Z. Moss, appeared in open court in person and by his attorney, P. J. Gallagher, and then and there filed in the said court a motion to dismiss the indictment in both of said cases," as above set forth.

The district attorney admits a conversation with Mr. Thompson on October 7, 1917, "with regard to the continuance of the said indictments for the said term and with regard to the dismissal of the said indictments at the spring term of 1918," and says that "at that time there was no definite agreement to dismiss the indictments or any one of them, but that the statement was made to Mr. Thompson at that time that unless for some reason known at that time the cases would be dismissed and that affiant thought at that time that they more than likely would be dismissed at

the spring term of court," but that he reserved "the right until the April term of court to make any final disposition with regard to the ultimate disposition of those cases." He declares that "at that time said W. Lair Thompson seemed as willing and as anxious to continue the said cases as I"; that the two indictments against the defendant were continued from the October term of 1917 with the consent, if not upon the request, of the defendant himself, and that the reason said cases were not disposed of during the April term of 1918 was:

"That the said W. Z. Moss absented himself from the court, and that the said W. Z. Moss and W. Lair Thompson, his attorney, at said April term, 1918, neither asked for nor demanded a trial of either of said indictments and that both of said parties kept away from said court so that this affiant could not have said cases set for trial during said term; and that before the end of said term of court, the sheriff of Harney County, Oregon, at the request of this affiant, as aforesaid, notified the said defendant, W. Z. Moss, to appear in court so that some disposition could be made of the said two indictments and that the said W. Z. Moss having refused and failed to appear upon the receipt of said notice from the said sheriff, and the said sheriff being unable to locate the said W. Z. Moss and to serve him with the bench warrant heretofore referred to, this affiant was unable to secure the attendance of the said W. Z. Moss and unable to dispose of the two indictments during the said April term of court."

It appears from the affidavit of Goodman, as sheriff of Harney County, that in September, 1918, he addressed a duly registered letter to the defendant at Lakeview, Oregon, his postoffice, in which he notified him to appear in court on Tuesday, the first day of October, 1918, to make some disposition of the pend-

ing indictment, and that he received the registration return card duly signed by the defendant. The affiant says that later in September, 1918, he saw the defendant at The Narrows in Harney County and personally notified him to appear in court on the date specified, "for the purpose of having the said indictments set for trial"; that at "said time the said W. Z. Moss stated to me that he would not appear before the said court at said time and if the court or the officers of Harney County wanted him they knew where to find him, or words to that effect." According to the affidavit, Moss left the state within a few days thereafter and returned about October 7, 1918, when he appeared in court in response to a bench warrant issued for him four days earlier.

No reply affidavits were filed by the defendant and none of the new matter set up in the counter-affidavits on the part of the state is denied. After argument the court overruled the motions to dismiss, from which the defendant appeals, assigning such ruling as error.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. McCamant, Bronaugh & Thompson,* with an oral argument by *Mr. Wallace McCamant.*

For the state there was a brief over the names of *Mr. J. O. Bailey,* Assistant Attorney General, *Mr. George M. Brown,* Attorney General, *Mr. M. A. Biggs,* District Attorney, and *Mr. John W. McCulloch,* with an oral argument by *Mr. Bailey.*

JOHNS, J.—Article I, Section 10, of the Constitution provides:

"No court shall be secret, but justice shall be administered openly and without purchase, completely and without delay."

Section 1701, L. O. L., provides:

"If a defendant indicted for a crime, whose trial has not been postponed upon his application or by his consent, be not brought to trial at the next term of the court in which the indictment is triable after it is found, the court must order the indictment to be dismissed, unless good cause to the contrary be shown."

The defendant was "not brought to trial at the next term of the court in which the indictment" was triable and he now contends that for such reason the cases against him should be dismissed. It appears from the record that on October 7, 1918, such a motion was filed to dismiss and was set for hearing at 1:30 P. M. of the same day. The journal entry shows that:

"The said defendant appearing in person, as well as by P. J. Gallagher and Geo. S. Sizemore, his attorneys, said defendant at this time asks leave to withdraw the said motion to dismiss, and leave to withdraw being granted, the said defendant, through his said attorneys, stated in open court that he was ready for trial and asked that the said cases be set for trial."

The order further shows that on the application of the defendant and with his consent the cases were set for trial on Monday, October 14, 1918, at 10:00 A. M. This record must be taken as true. On October 15, 1918, Mr. Thompson, as the sole attorney for the defendant, filed another motion, to dismiss.

It appears from the affidavits of both the state and the defendant that the cases were continued from the October term, 1917, to the April term, 1918, by consent. Mr. Thompson claims that his consent was based on an agreement with the district attorney that the cases would be dismissed at the April term, 1918, and his affidavit as to the facts is clear and specific. In legal effect, the district attorney admits that it was then his purpose to dismiss the indictments at the coming April

term, but claims that he reserved the right "until the April term of court to make any final disposition with regard to the ultimate disposition of those cases"; that the cases were not disposed of at the following April term for the reason that the defendant "absented himself from court and neither asked for nor demanded a trial on either indictment and kept away from court, so that the cases could not be set for trial"; that the term of court did open on the first Monday in April, 1918, and continued and remained open until the first Monday in October, 1918, and that in the first week of September, 1918, he directed and caused the sheriff to notify the defendant to appear in court on Tuesday, the first day of October, 1918, for the purpose of setting the cases for trial. The record shows that the defendant was notified by the sheriff and refused to appear; that by reason thereof the court issued a bench warrant and that in response thereto the defendant appeared in court on October 7, 1918, at which time the first motion to dismiss was filed. It further appears from the unchallenged affidavit of the district attorney that on the first day of the April term, 1918, the cases against the defendant were called on the docket by the court; that the defendant then appeared by his attorney, P. J. Gallagher; that after some argument and discussion the district attorney stated that L. R. Webster, an attorney who had been employed by the prosecution, was then absent but would "be in attendance upon the court within a day or two," and that Mr. Webster arrived during the first week of the term and was in attendance upon the court for several days. Before his arrival the defendant absented himself from court, left Harney County and did not again appear during the term, either in person or by attorney.

It further appears by the affidavit of Mr. Thompson that "on Monday, October 8, 1917, before court convened this affiant did relate to Honorable Dalton Biggs, Judge of the above-entitled court, the substance of the agreement between himself and the district attorney," and that upon the convening of court the district attorney stated "that an agreement had been reached to continue all of said indictments and said reduction of bail in certain cases which were involved in said agreement."

1. Assuming that the district attorney did make the agreement that the cases should be continued from the October term of 1917 to the April term of 1918, and should then be dismissed as set forth in Mr. Thompson's affidavit, and that the district attorney did violate the agreement, that would not be legal or sufficient ground to dismiss the indictments under either Article I, Section 10, of the Constitution or Section 1701, L. O. L. While it may be true that the trial court was advised of its substance, there is no record or evidence which tends to show that the court ever ratified or approved the alleged agreement; and the fact remains that all of the proceedings were heard before the trial judge, who overruled the motions to dismiss the indictments.

2. As he had personal knowledge of all of the proceedings, we think his ruling is entitled to some weight.

3, 4. The cases were continued from the October term of 1917 to the following April term, with the express consent and approval of the defendant. While it is true that he was present at the beginning of the April term, there is nothing to show that he sought or demanded a trial, and the record discloses that pending the arrival of Mr. Webster during the early part of the first week of the term, he absented himself from

court and stayed away for the remainder of the term. When he was finally brought into court on a bench warrant he filed a motion to dismiss, because his case was not tried at the April term. Upon the hearing he asked and was granted leave to withdraw that motion and through his attorneys he stated in open court that he was ready for trial and asked to have the cases set for hearing. Upon his application and consent they were set for trial on October 14, 1918. On October 15, 1918, he filed another motion to dismiss, on the identical ground stated in his original motion. In legal effect his withdrawal of the motion to dismiss, with the statement in open court that he was ready for trial and his application and consent to have the cases set for trial on October 14, 1918, constituted a waiver of his right thereafter to insist upon the motions to dismiss the indictments. Under such a state of facts, we do not believe that the defendant's motions to dismiss come within the terms and provisions of either Section 1701, L. O. L., or Article I, Section 10, of the Constitution.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

MR. JUSTICE BENSON took no part in the consideration of this case.

Argued April 10, writ allowed June 10, 1919.

OLCOTT, GOVERNOR, *v.* HOFF, STATE TREASURER.

(181 Pac. 466.)

Mandamus—Jurisdiction—Original Proceedings in Supreme Court—Scope of Relief.

1. On an original proceeding in *mandamus* in the Supreme Court, the court will decide all matters of general public interest and importance which the petition asks and which are argued in the briefs, not personal to the petitioner, and which, until decided, will seriously affect and unsettle the administration of the affairs of the state, though a decision as to such matter might be *dicta* as far as the parties involved are concerned.

[As to right to hold two offices at same time, see note in **Ann. Cas.** 1915A, 525.]

States—Death of Governor—Succession.

2. Where the governor of Oregon is removed, dies, resigns or is unable to discharge the duties of his office, the secretary of state becomes governor in fact and is entitled to receive compensation as such, under Article V, Section 8, of the Constitution, notwithstanding Article III, Section 1, Article II, Section 10, of the Constitution, providing, among other things, that no person shall hold more than one lucrative office at the same time.

Courts—Stare Decisis.

3. When one of the clauses of the Constitution has been construed by the Supreme Court, that construction should not be set aside except for the most cogent reasons.

Original proceeding in Supreme Court.

In Banc.

This is an original proceeding on a petition for an alternative writ of *mandamus,* in which it is alleged that at the general election on November 5, 1918, James Withycombe was elected governor of the state of Oregon and that he duly qualified for that office on January 14, 1919; that at the general election held on November 7, 1916, the petitioner, Ben W. Olcott, was elected secretary of state of the state of Oregon and that he duly qualified for that office on December 26, 1916; that ever since he "has been and now is the duly

qualified and acting secretary of state," and that on March 3, 1919, James Withycombe, the duly elected and qualified governor of the state, died. Further allegations of the petition follow:

"That under and by virtue of Section 8, Article V, of the constitution of Oregon, the office of governor and the duties thereof devolved upon the secretary of state, and that on the 7th day of March, your petitioner, Ben W. Olcott, took the oath of office and assumed the office and duties of governor; that he has been since that time and now is the governor of the state of Oregon.

"That on April 1, 1919, a warrant was duly issued by the secretary of state in favor of Ben W. Olcott, governor, for the sum of $336.00, in payment of the salary due said Ben W. Olcott, as governor, from March 7th to March 31st (inclusive), 1919, in accordance with law.

"That your petitioner has presented said warrant to O. P. Hoff, state treasurer, and that said O. P. Hoff, state treasurer, has failed and refused and still fails and refuses to pay the same, alleging as his reason that the warrant should be drawn to Ben W. Olcott, secretary of state, acting governor.

"That there is money in the state treasurer's hands to the credit of the fund for the payment of the salary of governor, which money was appropriated by H. B. No. 470, passed at the thirtieth session of the legislature, sufficient to pay petitioner's claim."

Wherefore the petitioner prays:

"That an alternative writ of *mandamus* issue out of this court, returnable on the 8th day of April, 1919, commanding the said O. P. Hoff, state treasurer, to pay said warrant, or on the failure thereof to show this court on the return day, why the same has not been done, and for such other relief as may be proper, and your petitioner particularly prays that this court will define his duties and powers in relation to the office of governor."

To this petition the defendant O. P. Hoff, state treasurer, demurred upon the ground that, "it appears from the face thereof that the writ does not state facts sufficient to constitute a cause of action against this defendant." The case was argued and submitted on April 10, 1919, at which time the court extended a general invitation to the bar of the state to file informal briefs on either side, as a result of which numerous and exhaustive briefs *pro* and *con* were submitted by able and distinguished attorneys, covering a wide range of research and investigation.

On behalf of the petitioner it is vigorously contended that in the interests of the general public, to settle and determine chaotic political and governmental conditions, this court should define his official title and tenure of office and prescribe his duties. The right or province of this court to decide such questions under the record is strenuously denied by opposing briefs. The vital question we are asked to decide is whether the petitioner, Mr. Olcott, holds the office of governor in fact, and if so, for how long, or whether he has the right only to discharge the duties of that office during the remainder of his term as secretary of state. For the purposes of this opinion, all of the allegations of the petition must be deemed taken as true.

WRIT ALLOWED.

For petitioner there was a brief with oral arguments by *Mr. George M. Brown,* Attorney General, and *Mr. J. M. Devers,* Assistant to the Attorney General.

For defendant there was a brief and an oral argument by *Mr. J. G. Richardson.*

As *Amici Curiae,* briefs were submitted on behalf of petitioner by the following attorneys: *Mr. Stephen*

A. Lowell, Messrs. Carey & Kerr, Mr. Fred W. Mulkey, Messrs. Wood, Montague & Hunt, Mr. Martin L. Pipes, Mr. Charles J. Schnabel and *Mr. J. G. Arnold.*

As *Amici Curiae,* briefs were submitted on behalf of defendant by the following attorneys: *Mr. Frank S. Grant, Mr. Ralph E. Moody* and *Mr. William H. Holmes.*

JOHNS, J.—Under our form of government all power, both state and federal, is vested in the legislative, executive and judicial departments. Each is separate and distinct from the other. In the affairs of state the governor is the chief executive and all other officers in that branch are more or less subordinate to his position. The office of secretary of state is next in importance. Article III, Section 1, of the Constitution provides:

"The powers of the government shall be divided into three separate departments—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided."

Sections 1 and 8 of Article V follow:

"The chief executive power of the state shall be vested in a governor, who shall hold his office for the term of four years; and no person shall be eligible to such office more than eight in any period of twelve years.

"In case of the removal of the governor from office, or of his death, resignation or inability to discharge the duties of the office, the same shall devolve on the secretary of state; and in case of the removal from office, death, resignation or inability, both of the governor and secretary of state, the president of the

senate shall act as governor, until the disability be removed, or a governor be elected."

The latter article also defines the qualifications of governor and the manner of his election, specifies who are ineligible for the office and names his special powers and duties.

1. In addition to such obligations and responsibilities, it is a matter of common knowledge that the governor is a member of numerous boards before which important business of all state institutions is daily transacted and by which large amounts of bonds are issued and certified for state purposes. This court knows as a matter of law that Mr. Olcott's term of office as secretary of state expires on January 3, 1921, and that if his right to the office of governor or to discharge the duties of that office ends with his term of secretary of state, another governor must be elected at the next general election. These are all matters of general public interest and importance, not personal to Mr. Olcott, and until such time as they are decided will seriously affect and unsettle the administration of the affairs of state. For such reasons, we think it is not only our province but our duty in this kind of a case in a measure to disregard and overlook any of the apparent forms or technicalities which have been suggested, and decide such public questions as are not inconsistent with our judicial duties.

2. Whether Mr. Olcott is governor in fact and holds the office as such for the unexpired term of the late Governor Withycombe, or whether he shall discharge the duties of that office for the remainder of his term as secretary of state, depends upon the legal construction which should be placed upon Article V, Section 8, of the Constitution, above quoted.

As stated by Mr. Justice McBRIDE in *State* v. *Finch*, 54 Or. 482 (103 Pac. 505), our Constitution is largely copied from that of Indiana, which was adopted by that state in 1851 and which provides:

"In case of the removal of the governor from office or of his death, resignation or inability to discharge the duties of the office, the same shall devolve on the lieutenant governor."

By substituting the words "secretary of state" for "lieutenant-governor" that section of the Indiana organic law is made identical with the corresponding section of our own Constitution. Counsel have not cited, and we have not been able to find any decision of the State of Indiana construing that section of its Constitution.

The Federal Constitution, Article II, Section 1, provides:

"In case of the removal of the president from office, or of his death, resignation or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president."

It will be noted that by inserting the words "powers and" between the words "the" and "duties" and substituting the title "vice-president" for "secretary of state" our own Constitution is made identical with the federal. In so far as we are advised, this particular section of the Federal Constitution has never been construed by any court, yet upon the death of the President no one has ever claimed that the Vice-president became Acting President only, or that he would not succeed to the office of president itself for the remainder of the unexpired term for which the President was elected.

We have examined the Constitutions of every state in the Union and none of them are identical with our

own, the closest resemblance being found in the Indiana and Federal Constitutions as above noted.

Under their respective Constitutions, in the event of the death of the governor, the powers and duties of that office devolve upon the lieutenant-governor in the following states:

Alabama	Nebraska
California	Nevada
Colorado	New Mexico
Connecticut	New York
Delaware	North Carolina
Idaho	North Dakota
Illinois	Ohio
Indiana	Oklahoma
Iowa	Pennsylvania
Kentucky	Rhode Island
Louisiana	South Dakota
Massachusetts	Texas
Michigan	Vermont
Minnesota	Virginia
Mississippi	Washington
Missouri	Wisconsin
Montana	

and under like condition such duties devolve upon the President or Speaker of the Senate in the following named states:

Arkansas	Maryland
Florida	New Hampshire
Georgia	New Jersey
Kansas	Tennessee
Maine	West Virginia.

It is only in Oregon, Arizona, Utah and Wyoming that in the event of the governor's death the secretary of state succeeds to his office or performs his duties. Excluding Oregon, the Constitutions of Alabama,

Delaware, New Mexico, Oklahoma, South Carolina and Virginia only, expressly provide that upon the death of the governor the office of governor itself shall devolve upon his designated successor; and we have not been cited to, or able to find any decision by the courts of either of those states construing that particular section of their respective Constitutions.

The only decision of this court on the subject was rendered in the case of *Chadwick* v. *Earhart,* 11 Or. 389 (4 Pac. 1180), which is vigorously assailed by counsel here, who claim that it was largely *dictum,* is not the law and should be overruled. That case was decided at the October term, 1884, and it appears from the brief of the respondent R. P. Earhart, who was then the secretary of state, that:

"The statement of facts contained in the stipulation which is the basis of this action may be briefly stated by submitting the questions. In the event of the resignation of the governor of Oregon does the secretary of state become the governor by operation of law, and is he entitled to the salary provided by law for that office? * * A nice question is raised by the stipulation, but it is of no importance in ascertaining whether appellant is entitled to the salary in question, that is, was the appellant the governor during the two days after the qualification of the respondent and before the qualification of Governor Thayer? And further, as the secretary of state is governor or acting governor, as the case may be, the office or duties thereof devolved on the respondent during that time. And we maintain that the title to each office terminated with the expiration of the four years after his qualification."

Among other things, it was stipulated that:

"Mr. Earhart objects to the salary being paid from the 9th day of September, 1878, to the 11th day of September, 1878—two days—on the ground that Mr. Chadwick was not secretary of state after Mr. Ear-

hart was sworn in on the 9th day of September, 1878, though Mr. Chadwick acted as governor until and including the 11th day of September, 1878."

The attorney for Mr. Chadwick, the appellant, made the following contention in his brief:

"In the event of the happening of any one of the above contingencies the office of governor devolves upon the secretary of state. The language in reference to the duties of secretary of state in this event is the same as that defining the office of President when the Vice President succeeds to the same, except the word 'powers' is omitted.

"The office of governor is distinctive. It cannot merge into another. It cannot be vacant any more than can be the President's office. The appointments under a constitution cannot be broken, whether they are made by an election or otherwise. The office is always filled. The incumbent is an incident to the office. Whether the incumbent is at the time secretary of state, he is the governor, and as much as if his appointment had been made by an election. *The office devolves on him.* The means used to fill the office of governor are absolute, and while they may be different according to contingencies, the one act of filling the office makes the incumbent governor. It is the office, not the man. Under a constitution there can be no such thing as an 'acting officer.' That is one that appears to be what he is not. No more than a clerk of a department could discharge the duties of President.

"There can be but one construction of the constitution in reference to this matter, and that is that the office shall devolve on the secretary of state. Duties are subordinate to the office and a part of it, and when the office devolves on the secretary of state, duties follow—*prescribed, or to be prescribed, by legislative enactment*: 1 Kent Com. 279."

It was on such stipulation of facts and the briefs of respective counsel that the decision was rendered,

wherein this court through Mr. Chief Justice WALDO said:

"Two questions are submitted in this case. The first and principal one is, whether, when, under section 8 of Article V of the constitution of Oregon, the duties of the office of governor devolve upon the secretary of state, he has a right to the salary of the office. Second. If this question be answered in the affirmative, whether he shall continue to perform the duties of the office for the remainder of the term of the outgoing governor, or shall he perform those duties only so long as he shall continue to be secretary of state. * * *

"Counsel for the respondent claims that in the contingency provided for in said section 8, the duties of the office of governor become annexed to the office of secretary of state, and are discharged as duties incident to the latter office. In other words, that the duties of the office, but not the office itself, devolve upon the secretary of state.

"This position seems to require: First. Either that the office of governor should continue vacant during the time the secretary discharges its duties, and that such duties be in some way performed by the secretary of state, as such, consistently with a condition of vacancy; or, Second. That the office be filled and yet he who fills it be in nowise governor, but continue to be merely secretary of state.

"In the first place, it is not shown how an office can be vacant and yet there be a person, not the deputy, or *locum tenens,* of another, empowered by law to discharge the duties of the office and who does in fact discharge them. It is not explained how, in such a case, the duties can be separated from the office, so that he who discharges them does not become an incumbent of the office. And, in the second place, how a person can fill the office of governor without being governor.

"It is the function of a public officer to discharge public duties. Such duties constitute his office. Hence, given, a public office and one who, duly empowered, discharges its duties, and we have an incumbent in

that office. Such is the case here. The secretary of state, by force of the function cast upon him, becomes governor, and consequently entitled to the salary appertaining to the office.

"Nor does the language of the section, grammatically considered, bear the interpretation counsel has put upon it. Leaving out the co-ordinate clauses following the first clause, and the sentence reads: 'In case of the removal of the governor from office, the same shall devolve on the secretary of state'; that is, the office shall devolve. So, taken with each of the succeeding clauses, the word 'same' stands for 'office.' "

As to the second question, the opinion holds that the individual

" * * answering the description at the time the contingency arises designates him as the person who is to enter and fill the office, and when, as thus designated, he enters into the office, he holds it in his natural, and not in his official capacity. This seems to be the principle which applies when the office of governor devolves on the secretary of state on the happening of any of the events specified in the constitution. * * Now, as two offices may remain distinct, which are not incompatible though the officer is the same person, it would seem that the same principle should govern the holding of the office of governor by the secretary of state.

"This question, therefore, must also be answered in favor of the appellant, and judgment be entered accordingly."

We do not agree with the statement of counsel that other courts have refused "to accept the Chadwick case as sound law." Upon that particular point, no United States court has ever construed the Federal Constitution and no state court has ever rendered any decision construing the same, or a similar provision of a state Constitution.

To support the argument that Mr. Olcott does not hold the office and is acting governor only, *amicus curiae*, counsel for defendant, cites and relies upon the following authorities: *State* v. *Grant*, 12 Wyo. 1 (73 Pac. 470, 2 Ann. Cas. 382); *State* v. *Saddler*, 23 Nev. 357 (47 Pac. 450); *Clifford* v. *Heller*, 63 N. J. Law, 105 (42 Atl. 155, 57 L. R. A. 312); *People* v. *Budd*, 114 Cal. 168 (45 Pac. 1060, 34 L. R. A. 46); *People* v. *Cornforth*, 34 Colo. 107 (81 Pac. 871); *Opinion of the Justices*, 70 Me. 570; *State* v. *Stearns*, 72 Minn. 200 (75 N. W. 210); *State* v. *McBride*, 29 Wash. 335 (70 Pac. 26); *Futrell* v. *Oldham*, 107 Ark. 386 (155 S. W. 502, Ann. Cas. 1915A, 571). Those decisions were rendered under the respective Constitutions of the different states, which provide as follows:

"If the governor be impeached, displaced, resign or die, or from mental or physical disease or otherwise, become incapable of performing the duties of his office or be absent from the state, the secretary of state shall act as governor until the vacancy is filled or the disability removed": Wyoming, Art. IV, § 6.

"In case of the impeachment of the governor or his removal from office, death, inability to discharge the duties of the said office, resignation or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term or until the disability shall cease": Nevada, Art. V, § 18.

"In case of the death, resignation or removal from office of the governor, the powers, duties and emoluments of the office shall devolve upon the president of the senate": New Jersey, Art. V, § 12.

"In case of the impeachment of the governor or his removal from office, death, inability to discharge the powers and duties of his office, resignation or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue

of the term or until the disability shall cease": California, Art. V, § 16.

"In case of the death, impeachment or conviction of felony or infamous misdemeanor, failure to qualify, resignation, absence from the state or other disability of the governor, the powers, duties and emoluments of the office for the residue of the term or until the disability be removed, shall devolve upon the lieutenant governor": Colorado, Art. IV, § 13.

"Whenever the office of the governor shall become vacant by death, resignation, removal from office or otherwise, the president of the senate shall exercise the office of governor until another governor shall be duly qualified": Maine, Art. V, § 14.

"The lieutenant governor shall be *ex-officio* president of the senate; and in case a vacancy shall occur, from any cause whatever, in the office of governor, he shall be governor during such vacancy": Minnesota, Art. V, § 6.

"In case of the removal, resignation, death or disability of the governor, the duties of the office shall devolve upon the lieutenant governor": Washington, Art. III, § 10.

"In case of the death, conviction or impeachment, failure to qualify, resignation, absence from the state, or other disability of the governor, the powers, duties and emoluments of the office for the remainder of the term or until the disability be removed or a governor elected and qualified, shall devolve upon and accrue to the president of the senate": Arkansas, Art. VI, § 12.

It will be noted that in all of the sections quoted it is not the office, but the powers and duties of the office, which devolve upon his successor in the event of the death of the governor. The importance of that distinction is clearly pointed out by the recent decision of the Supreme Court of Arkansas in construing the Constitution of that state in the case of *Futrell* v. *Old-*

ham, 107 Ark. 386 (155 S. W. 502, Ann. Cas. 1915A, 571), where the opinion says:

"If the framers of the constitution had intended to provide for the devolution of the office of governor, in case of vacancy by resignation or otherwise, upon the president of the senate, that intention could easily have been directly expressed in appropriate words. But they chose other terms which clearly observe the distinction between the course of succession of the office itself and a mere devolution of the duties and the emoluments of the office for the time being, and deliberately adopted the latter as the best means of having the government administered until the people themselves can elect a governor."

That distinction was also made and emphasized by this court in the case of *Chadwick* v. *Earhart*, 11 Or. 389 (4 Pac. 1180).

W. H. Holmes, who submitted an *amicus curiae* brief in the instant case, was also one of counsel for the respondent Earhart in the Chadwick case and then contended that "the right of the appellant to the salary would depend on whether the title of the office of governor was vested in him or not"; that the title to that office was not vested in Chadwick and that his term as governor was special, "and the time cannot be extended by implication." In his brief in the pending case he frankly says:

"If the Chadwick case was correct law, it would seem the question has already been determined judicially and there would be nothing for the attorney general to do except to state that the question has been decided by the court of last resort in the state of Oregon and that the secretary of state would be justified in following the decision. Owing to the refusal of other courts in the land to accept the Chadwick case as sound law, and inasmuch as the secretary of state wants his rights and duties defined in regard to resigning his

office as secretary of state, with the view of assuming the office of governor and appointing a person to the office which he proposes to resign, it is important that the question now before the court be correctly decided."

Then, as now, he vigorously asserted that it was not the law and should be overruled.

Much stress is laid upon the fact that R. P. Boise was a member of the constitutional convention and that as circuit judge he sustained the demurrer to the complaint in the Chadwick case. We have a very high regard and a profound respect for his judicial learning and ability, but his decision was rendered under the old practice and upon an agreed statement of facts, with a view of prosecuting an appeal and obtaining an early decision in the appellate court. Outside of the fact that Judge Boise sustained the demurrer, there is no written evidence in this or the Circuit Court as to what may have been his personal opinion or reason for sustaining the demurrer. The fact remains that the Chadwick case was decided by this court in October, 1884; that the opinion of the then judges of this court, WILLIAM P. LORD, W. W. THAYER and J. P. WALDO, Chief Justice, was unanimous and that for more than thirty-four years it has never been questioned in this court.

Counsel now attack the grammatical construction given to that section of the Constitution in the opinion, contending that the word "same" as used therein refers to the word "duties" and not to "office," and that it should be construed to mean that in case of the removal of the governor or of his death, resignation or inability to discharge the duties of his office, the duties of the office, and not the office itself should devolve upon the secretary of state. That question was

squarely decided in the Chadwick case and its decision was necessary to the opinion. It was there contended that Chadwick knew of the terms and provisions of that section of the Constitution when he was elected and qualified as secretary of state; that because he was secretary of state he might be called upon to perform the duties of the office of governor and for such reason he was not entitled to receive any compensation for his services in that capacity, and that even though he performed the duties of governor he should receive only his salary as secretary of state. In deciding that point the court held that the word "same" relates to and qualifies the word "office" and in legal effect that the section should read:

"In case of the removal of the governor from office or of his death, resignation or inability to discharge the duties of the office, the office itself shall devolve upon the secretary of state."

Article II, Section 7, of the organic law of Oregon adopted in 1845, provides that:

"The governor shall continue in office two years, and until his successor is duly elected and qualified; and in case of the office becoming vacant by death, resignation or otherwise, the secretary shall exercise the duties of the office until the vacancy be filled by election."

Volume 9 of United States Statutes at Large, page 324, Act Aug. 14, 1848, c. 177, Section 3, establishing the territory of Oregon, provides:

"And in case of death, removal, resignation or absence of the governor from the territory, the secretary shall be, and he is hereby authorized * * to perform all the powers and duties of the governor, during such vacancy or absence, or until another governor shall duly be appointed and qualified to fill such vacancy."

Our present Constitution was adopted on November 9, 1857, and its framers must have known of such terms and provisions of the organic law and territorial statutes, both of which specify that in the event of the death of the governor the secretary of state shall exercise and perform the duties of that office; that under the organic law he should perform those duties "until the vacancy be filled by election," and that under the territorial statute he should perform those duties "during such vacancy or absence, or until another governor shall duly be appointed and qualified to fill such vacancy." Yet with such knowledge it is significant that the Constitution which they adopted provides that:

"In case of the removal of the governor from office, or of his death, resignation or inability to discharge the duties of the office, the same shall devolve on the secretary of state."

They did not select either, but drafted and adopted another section, using language of their own, with a different meaning. That section further says:

"In case of the removal from office, death, resignation or inability, both of the governor and the secretary of state, the president of the senate shall act as governor until the disability be removed or a governor elected."

And it is contended that because in such a case "the President of the Senate shall act as governor," it must follow that the section should be construed to mean that upon the death of the governor the secretary of state should "act as governor." We do not think that it will bear that construction. It specifically says that:

"In case of the removal of the governor from office, or of his death, resignation or inability to discharge

the duties of the office, the same shall devolve on the secretary of state"

—and that in the event of the death or disability of both the governor and the secretary of state the president of the senate shall act as governor. It does not say that the secretary of state shall act as governor, although it says that the president of the senate shall "act as governor." If it had been the intent of the framers of the Constitution that the secretary of state should "act as governor," it would have been an easy matter to say so and to apply the same language to the secretary of state that it did to the president of the senate.

3. Upon the question of *stare decisis* the Supreme Court of Washington in *In re City of Seattle,* 62 Wash. 218 (113 Pac. 762), says:

"The rule of *stare decisis* is peculiarly applicable to the construction of the constitution. The interpretation of that document should not be made dependent upon every change in the personnel of the court. When one of its clauses has been construed, that construction should not be set aside except for the most cogent reasons. Certainty in the law is of the first importance."

In Cooley's Constitutional Limitations (7 ed.), page 83, it is said:

"Precedents, therefore, become important, and counsel are allowed and expected to call the attention of the court to them, not as concluding controversies, but as guides to the judicial mind. Chancellor Kent says: 'A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was mis-

understood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness and the community has a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very urgent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a perplexing uncertainty as to the law.' "

This rule of construction has been adopted and followed by a long line of decisions of this court, commencing with the case of *State* v. *Clark*, 9 Or. 470, and ending with the case of *Multnomah County* v. *United States Fidelity & Guaranty Co.*, 92 Or. 146 (180 Pac. 104), decided April 22, 1919. The rule is well stated by Mr. Justice BURNETT in his dissenting opinion in *Kalich* v. *Knapp*, 73 Or. 587 (145 Pac. 27, Ann. Cas. 1916E, 1051), thus:

"Another doctrine equally well settled is that of *stare decisis*, to the effect that, when a decision has once been rendered, it amounts to an authoritative construction of the law, and should not be disregarded or overturned, except for very cogent reasons showing beyond question that on principle it was wrongly decided. The principle is that laws are largely conventional rules of action, and it is more important that the rule be settled as a guiding precept to the public than that by the action of the courts the law should

be made to fluctuate like the tides." (Citing authorities.)

Article II, Section 10, of the Constitution provides that:

"* * Nor shall any person hold more than one lucrative office at the same time, except as in this constitution expressly permitted."

It is contended that under Article III, Section 1, *supra*, and the section just quoted no one individual can receive the emoluments and hold the offices of governor and secretary of state at the same time, but it will be noted that each of such sections contains the clause, "except as in this Constitution expressly permitted," and that the offices of governor and secretary of state are both executive or administrative, and not legislative or judicial. All of the Constitution was adopted at the same time and its various provisions must be construed as a whole, and when Article II, Section 10, and Article III, Section 1, are considered with Article V, Section 8, they are not in conflict. The devolving of the office of governor, at the death of that official, upon the secretary of state is one of the exceptions contemplated by the framers of the Constitution, provided for by Article II, Section 10, and Article III, Section 1. The word "devolve" has a legal meaning and is well defined by Bouvier thus: "To pass from a person dying to a person living."

Regardless of the question as to whether the Chadwick case is sustained by the weight of authority, the fact remains that since its decision in October, 1884, many legislatures have come and gone; that the people have directly or indirectly had the power to amend the Constitution; that for more than thirty-four years it has been the law of the state and that it was decided

by eminent justices of this court and is sustained by such reasoning and authority as clearly to bring it within the rule of *stare decisis* and make it binding on this court.

Mr. Olcott is governor in fact and has the right and title to the office itself, with the accompanying right and authority to perform the duties and receive the emoluments of the office. As to whether he could resign as secretary of state, and as governor appoint another to that position and still continue to hold the office of governor, we do not feel legally justified in going beyond anything said in this opinion. That is less a public and more a personal question for Mr. Olcott.

But we do hold that upon the death of the late Governor Withycombe, by reason of the fact that Mr. Olcott was then secretary of state he automatically became governor, and when he took the oath as such the office of governor and the title to that office were thrust upon him by the terms and provisions of Article V, Section 8, of the Constitution, and that under the authority of *Chadwick* v. *Earhart*, 11 Or. 389 (4 Pac. 1180), he became and is now governor in fact and is entitled to hold that office, perform all of its duties and receive its emoluments for the full period of the unexpired term to which the late Governor Withycombe was elected. This decision is based upon the express terms and provisions of our state Constitution which was adopted by a direct vote of the people and which within itself, in case of the removal of the governor from office, or of his death, etc., provides how and by whom the office of governor shall be filled; and for such reason it is not in conflict with the recent opinion of the majority of this court in *State ex rel.* v. *Kellaher*, 90 Or. 538 (177 Pac. 944). In that kind of

a case there is a vacancy and the law provides for an appointment to fill the same and states by whom the appointment shall be made. In the instant case, however, when the people elected Mr. Olcott secretary of state, by the very terms of the Constitution they elected him to become governor upon the death of Governor Withycombe. There was no vacancy in that office, as the people, speaking through the Constitution, have made their own selection.

The court sincerely thanks distinguished counsel for their able and instructive briefs as *amici curiæ* on the respective sides and assures them that the same are duly appreciated.

Let the writ issue as prayed for in the petition.

WRIT ALLOWED.

MR. JUSTICE BEAN concurs.

McBRIDE, C. J., Specially Concurring.—I fully concur with the reasoning of Justice JOHNS, and in the conclusion arrived at by him, but think we should go further and decide every question that is presented in the briefs.

In the specially concurring opinions of Justices BURNETT and BENNETT, it is urged that the question, as to whether the petitioner will hold for the remainder of the unexpired term of the late Governor Withycombe, or only until his own term as secretary of state expires; and the further question, as to whether Mr. Olcott can now resign the office of secretary of state and continue to hold the office of governor, are not necessarily involved here, and that any discussion of these questions is academic, and any opinion rendered in respect to them, would be merely *dictum*.

If these questions involved merely the private rights of individuals this contention would undoubtedly be correct; but where the general public has an interest

in the controversy the courts have, with substantial unanimity, disregarded the technical limitations embraced in the term "*dictum*" and decided the whole controversy where such a course appeared promotive of the public good, or calculated to settle disputed construction of provisions of the Constitution and prevent future litigation concerning them. I do not now refer to or cite the decisions from those states where the law provides for the submission of such questions to the Supreme Court without suit, but to those having Constitutions no broader in these respects than our own and to the Supreme Court of the United States: *Giles* v. *Harris,* 189 U. S. 475 (47 L. Ed. 909, 23 Sup. Ct. Rep. 639); *Memphis St. Ry. Co.* v. *Rapid Transit Co.,* 133 Tenn. 99 (179 S. W. 635, Ann. Cas. 1917C, 1045, L. R. A. 1916B, 1147); *Boise City Irr. & Land Co.* v. *Clark,* 131 Fed. 415 (65 C. C. A. 399); *Borgnis* v. *Falk Co.,* 147 Wis. 327 (133 N. W. 209, 37 L. R. A. (N. S.) 489); *State* v. *Stutsman,* 24 N. D. 68 (139 N. W. 83, Ann. Cas. 1914D, 776); *State* v. *Southern Tel. & Cons. Co.,* 65 Fla. 67 (61 South. 119); *Commonwealth of Massachusetts* v. *Klaus,* 145 App. Div. 798 (130 N. Y. Supp. 713); *In re Fairchild,* 151 N. Y. 361 (45 N. E. 943); *People* v. *General Committee of Republican Party,* 25 App. Div. 339 (49 N. Y. Supp. 723); *In re Morgan,* 114 App. Div. 45 (99 N. Y. Supp. 775).

In *Giles* v. *Harris,* 189 U. S. 475 (47 L. Ed. 909, 23 Sup. Ct. Rep. 639), the United States Supreme Court says:

"Perhaps it should be added to the foregoing statement that the bill was filed in September, 1902, and alleged the plaintiff's desire to vote at an election coming off in November. This election has gone by, so that it is impossible to give specific relief with regard to that. But we are not prepared to dismiss the bill or the appeal on that ground, because to be enabled

to cast a vote in that election is not, as in *Mills* v. *Green*, 159 U. S. 651, 657 (40 L. Ed. 293, 16 Sup. Ct. Rep. 132), the whole object of the bill. It is not even the principal object of relief sought by the plaintiff. The principal object of that is to obtain the permanent advantages of registration as of a date before 1903. * *

"The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. * * But we cannot forget that we are dealing with a new and extraordinary situation, and we are unwilling to stop short of the final considerations which seem to us to dispose of the case": *Giles* v. *Harris*, 189 U. S. 475, 484, 486 (47 L. Ed. 909, 23 Sup. Ct. Rep. 639, 641, 642).

In *Memphis St. Ry. Co.* v. *Rapid Transit Co.*, 133 Tenn. 99 (179 S. W. 635, Ann. Cas. 1917C, 1045, L. R. A. 1916B, 1147), the Supreme Court of Tennessee says:

"We have formerly held that when any question involving the constitutionality of an Act of the Legislature is *bona fide* made and relied upon in a case, this Court should take appellate jurisdiction of such a case. * * Although we appreciate the delicacy of passing on the validity of an Act of the Legislature, such a duty is often imposed upon us and we must not dodge our jurisdiction. Where an Act of the Legislature undertakes to regulate a particular subject and the application of such an act is invoked by one party in a suit involving that subject and the validity of the Act is questioned by the other party, we think it proper that the statute should be tested."

In *State* v. *Southern Tel. & Constr. Co.*, 65 Fla. 67 (61 South. 119), the Supreme Court of Florida says:

"The Railroad Commissioners, acting for the state, are the relators and plaintiffs in error, and the fact that the person in whose favor the order is sought to be enforced has moved away does not show that under no circumstances can the writ be made effective for the purpose designed in this case. And even if under

no circumstances the writ could be made effective because of Mr. Chaires' removal, the appellate court does not thereby lose jurisdiction of the cause, and it may be retained for the determination of questions properly presented involving the duties and authority of state officials that are of general interest to the public. * *

"The respondent's motion to quash the alternative writ presents questions of law that affect the authority and duties of the Railroad Commissioners in regulating the service rendered by telephone companies, and the public as well as the relators is interested in having the legal questions raised determined for the future guidance of the state officials. * * "

In *Commonwealth of Massachusetts* v. *Klaus,* 145 App. Div. 798 (130 N. Y. Supp. 713), the court says:

"This is an appeal from an order of a justice * * denying a motion to issue a subpoena requiring Rembrandt Peale, a person within the state, to appear and testify in a criminal action pending in the state of Mass. * * By the subpoena applied for, it was sought to procure the attendance of Peale in Mass. in Sept., 1910, and it may be that the criminal prosecution has already ended, so that his attendance would now be useless.

"On this point the papers on appeal do not advise us, but even if such were the case we should deem it our duty to examine the question of the validity of the act because the special term decision already referred to will, unless overruled, probably serve to render the act nugatory. Appellate courts not infrequently pass upon questions affecting public interests, even where in the particular case the question has become academic."

In re Fairchild, 151 N. Y. 361 (45 N. E. 943), the Court of Appeals of New York says:

"The respondent contends that, inasmuch as the election has been held, the decision of the questions presented on this appeal is of no importance, as it can,

at most, only affect the questions of costs. We think the questions involved are of sufficient importance to require their determination by this court, as it may prevent future embarrassment in the congressional district to which the controversy relates, and also settle other questions upon which there is a conflict in the decisions of the supreme court. * * "

In *People* v. *General Committee, etc.*, 25 App. Div. 339 (49 N. Y. Supp. 723), the same court says:

"This court held *In re Cuddeback*, 3 App. Div. 103 (39 N. Y. Supp. 388), viz.:

" 'An appeal will not always be dismissed because the question is no longer a practical one. Notwithstanding the fact that an election has been held, and a decision of the question involved cannot affect the result of that election, yet, where the point at issue is one of public interest, affecting the rights of all the electors of the state, the courts will determine it.'

"Following the doctrine there laid down, it seems that we ought not, in this case, to dismiss the appeal, because the question here involved is as much a matter of public interest as the question involved in the case from which the quotation has been made. * * "

And *In re Morgan*, 114 App. Div. 45 (99 N. Y. Supp. 775), the same court says:

" * * The sole question involved in this appeal is the constitutionality of said amendment, and, although the said election has long since passed, and therefore our decision can have no effect upon the rights of the appellant at said election, both sides urge a consideration by this court of a public question vitally affecting the conduct of elections in the future. Although in one sense academic, such considerations have moved both this court * * and the Court of Appeals * * to consider and determine cases involving the election laws, although the immediate necessity therefor has passed away. * * "

This phase of the matter here under discussion did not escape the astute mind of Bouvier, who observes:

"So also it has been held, with respect to a court of last resort, that all that is needed to render its decision authoritative is that there was an application of the judicial mind to the precise question adjudged; and that the point was investigated with care and considered in its fullest extent (*Alexander* v. *Worthington et al.*), 5 Md. 488; and that when a question of general interest is involved, and is fully discussed and submitted by counsel, and the court decides the question with a view to settle the law, the decision cannot be considered a *dictum.* (Id.)"

In the present case it cannot be successfully argued that the public has not a profound interest in the speedy solution of the questions submitted. There can be little question that Mr. Olcott is entitled to hold both the office of governor and secretary of state, and to draw the salaries of both. It is creditable to him that he does not wish to do the first and will not do the second. In the infancy of the state, when its business was insignificant and its revenues small, one person could well perform the duties of both governor and secretary of state, but with the enormous expansion of state business each of the three constitutional officers finds in his own department all the business which he can attend to, and more.

Questions, involving the care and expenditure of vast sums of money and affecting large social and economic interests, continually present themselves before the various boards, of which these officers are members. The object of having a board, composed of these officers, was to have the advantage of the opinions of three minds and the independent research of three persons before conclusions, vital in the administration of the state's fiscal affairs, were arrived at. Where the offices of governor and secretary of state are merged in one individual, the public loses the safe-

guard that was intended by the Constitution when it provided that certain boards should consist of three officers, namely, the governor, secretary and treasurer. If it is possible for Mr. Olcott to give up the office of secretary of state and retain the office of governor, he should be permitted to do so, in the public interest, and we ought not to quibble about "*dicta*" in so declaring.

The public also has an interest in having the duration of his term of office settled. If a new governor is to be chosen at the next general election, the voters of the state should be apprised of that fact, so they may look about and weigh the qualifications of the various candidates, or prospective candidates, with a view to enabling themselves to choose intelligently. With the question undecided, and perhaps a large majority of the voters under the impression that Mr. Olcott's term will not expire at the next general election, the primary election for that office will be clouded with uncertainties not conducive to intelligent selection.

It is true that each of these questions could be presented later by two or more additional lawsuits; that to use a homely simile, we could "cut the dog's tail off by inches" instead of by making one slash and finishing the business once for all.

It is true the progress by inches would furnish business for attorneys and capital for petty politicians, but it would not promote the interest of the public, which, as before shown, is to have these questions settled now.

I consider every question discussed in the various briefs absolutely settled by the case of *Chadwick* v. *Earhart*, 11 Or. 389 (4 Pac. 1180), cited in the principal opinion. Justice WALDO, who delivered the opin-

ion in that case, was not only a lawyer of great learning but notably accurate in his choice of language, and the language used by him seems to me to bear no other construction than that when the secretary of state becomes governor, he becomes such in his natural not official capacity; just as the Vice-president, on the death of the President, succeeds to the office for the remainder of the term. Such was the interpretation put upon that opinion by Justice LORD, who was one of his associates and who concurred in the opinion. After Justice LORD's retirement from the Bench, he was selected as a commissioner to revise the Oregon laws and produced the compilation which now bears his name.

His annotation to Article V, Section 8, of the Constitution, is as follows, citing *Chadwick* v. *Earhart*, 11 Or. 389 (4 Pac. 1180):

"Under this provision when the governor resigns, the duties of the governor's office devolve upon the secretary of state, who continues to perform them for the remainder of the term."

If the language of the opinion were even obscure, which it is not, this interpretation by one of the learned justices, who participated in its rendition, ought to settle the question as to what the court meant to decide.

I do not consider the cases of *State* v. *Johns*, 3 Or. 533, *State* v. *Ware*, 13 Or. 380 (10 Pac. 885), *State* v. *Kellaher*, 90 Or. 538 (177 Pac. 944), in point in the present controversy. They were decided upon the theory that where a vacancy in an elective office is filled by appointment, the people should have the right to elect a successor at the earliest opportunity. Such is not the case here. Mr. Olcott was not appointed to the office of governor. He succeeded to it by virtue of

his election to the office of secretary of state, just as the Vice-president of the United States, upon the death of the President, succeeds to that office. The people, when they elected him secretary of state, had notice, by the very terms of the Constitution, that in case the governor should die he would succeed to the office of governor; they chose him with that contingency in view. In effect, in choosing a secretary of state, they chose a vice-governor, the rules of whose succession to the office are in no wise different from those investing the Vice-president, except that while the governor lives the secretary performs the duties relating to the secretaryship, while the Vice-president—during the life of the President—performs the duties of President of the senate. In both instances the original source of their authority is an election by the people and not, as in the case of *State* v. *Johns,* 3 Or. 533, an appointment by the executive.

For the reasons given by Justice JOHNS, as well as those urged herein, I am of the opinion that this court should declare the petitioner is governor in fact and not acting governor; that he is entitled to the salary of governor; that he holds the office for the remainder of the term of the late Governor Withycombe, and that he may resign the office of secretary of state and still hold the office of governor.

HARRIS, J., Concurring in Part.—On April 1, 1919, a warrant was issued by the secretary of state in favor of "Ben W. Olcott, governor, for the sum of $336 in payment of the salary due said Ben W. Olcott, as governor, from March 7 to March 31, 1919." The state treasurer contends that the warrant "should be drawn to Ben W. Olcott, secretary of state, acting governor"; and since the warrant is not so drawn the state treas-

urer refuses to pay it. From this brief statement it can be seen at a glance that the sole question for decision is whether the state treasurer is obliged to pay the warrant; and yet while it is true that the only question for decision is whether the state treasurer must pay the warrant, it is also true that it may be necessary to decide certain preliminary questions before the ultimate question can be reached or decided; and therefore any opinion expressed about the preliminary questions or the ultimate question is not *obiter dictum*. As the writer views it, one of the preliminary questions is whether Ben W. Olcott was, from March 7th to March 31st, merely *ex-officio* governor or governor in his natural capacity. The petitioner is probably entitled to the salary attaching to the office of governor for the period mentioned in the warrant, whether he was merely acting as governor by virtue of his office as secretary of state or whether he was governor in truth and in his natural capacity. I prefer, however, to decide the ultimate question for decision by deciding whether Ben W. Olcott was only secretary of state and merely performing the duties of the office of governor as *ex-officio* governor or whether he was in truth governor, and thus place my conclusion upon stated, certain and defined ground. Furthermore, since the state treasurer will be obliged to pay warrants each month so long as the petitioner is entitled to occupy the office of governor, I think that we can with propriety discuss and determine the question as to how long Ben W. Olcott is entitled to hold the office of governor, and thus decide the rights of the petitioner upon the one hand and the duties of the defendant upon the other.

The conclusion reached by this court in 1884 in *Chadwick* v. *Earhart*, 11 Or. 389 (4 Pac. 1180), when

applied to the same facts confronting us now and here, indubitably decides that Ben W. Olcott is in truth governor. If Article V, Section 8, of the state Constitution were now for the first time presented for judicial construction I would, for reasons which to me are not only persuasive but convincing, take the view that upon the removal, death, resignation or inability of the governor to discharge the duties of the office, the secretary of state becomes merely *ex-officio* governor. In other words, it is my opinion that a correct construction of the Constitution only empowered Chadwick to act as governor until he ceased to be secretary of state and then the duties of the office of governor devolved upon Earhart, the succeeding secretary of state, until Thayer qualified as governor; or, applying what I conceive to be the meaning of the Constitution to the instant case, because and only because he is secretary of state, Ben W. Olcott would perform the duties of governor until his term as secretary of state expires on the first Monday in January, 1921, when his successor's term as secretary of state shall begin and such successor would then discharge the duties of governor until the speaker of the house of representatives at the session to be held in 1921 publishes the vote for governor. Although I would entertain an opinion different from that expressed in *Chadwick* v. *Earhart* if the question of the construction of Article V, Section 8, of the Organic Act were *res integra,* nevertheless, whatever the views of any of us may be, candor compels each of us to admit that the question of the construction of this section of the Constitution is not so plain and clear as to be entirely free from serious debate. The members of the legislative assembly of 1878 differed in their opinions as to whether Chadwick or Earhart was entitled to perform the duties of gov-

ernor during the two days which intervened between the expiration of Chadwick's term as secretary of state and the commencement of Thayer's term as governor; and in the subsequent litigation growing out of that situation, lawyers and judges differed in their views as to whether the secretary of state became governor in his natural capacity upon the death or resignation of the governor. Stephen F. Chadwick was a member of the constitutional convention and he asserted that he was entitled to hold the office of governor until the inauguration of Thayer who had been elected at the June, 1878, election; but so far as the writer has been able to discover, every other member of the constitutional convention, who has left any record of his view, was of the opinion that Chadwick was only governor *ex-officio* and that when Earhart became secretary of state he and not Chadwick was entitled to act as governor until the inauguration of Thayer. The house and senate journals of the session of 1878 contain some interesting information. Before noticing the legislative journals, however, we should first acquaint ourselves with all the facts entering into the controversy in *Chadwick* v. *Earhart,* because by so doing we can better understand the story told by the house and senate journals and better comprehend the full meaning of the decision rendered in that lawsuit.

Stephen F. Chadwick was elected secretary of state and L. F. Grover was chosen governor at the June, 1874, election. Each was elected for a term of four years. At that time the biennial sessions of the legislative assembly commenced on the second Monday of September in the even-numbered years and this accounts for the fact that there was a regular session in 1874 and also in 1878; but commencing with 1885 the biennial sessions have begun on the second Mon-

day in January of the odd-numbered years: Article IV, Section 10, State Constitution; Section 2594, L. O. L. The Constitution provides that the returns of every election for governor shall be sealed up and directed to the speaker of the house of representatives who shall open and publish them in the presence of both houses of the legislative assembly: Article V, Section 4. In 1878, as now, the law provided that the term of office of the governor ceases when his successor, having been declared elected by the legislative assembly, as provided in the Constitution, shall be inaugurated by taking the oath of office: Deady's Code, p. 711; Section 3440, L. O. L. See also Chapter 84, Laws 1913. In 1878, the statute provided that—

"The term of office of the secretary of state, state treasurer and state printer shall cease on the first day of the regular session of the legislative assembly next following the general election on which the terms of their successors shall begin": Deady's Code, p. 711; Section 3441, L. O. L.

In 1908 the Constitution was amended so as to read thus:

"All officers except the governor, elected at any regular general biennial election after the adoption of this amendment, shall assume the duties of their respective offices on the first Monday in January following such election": Article II, Section 14.

The legislative session which was held in 1878 commenced on Monday the ninth day of September; R. P. Earhart was elected secretary of state at the June 1878 election; Chadwick qualified as secretary of state in September 1874 and by force of the statute then in existence his term as secretary of state ceased on September 9, 1878, and Earhart's term as secretary of state began simultaneously with the termination of

Chadwick's term as secretary of state. The legislative assembly of 1876 elected L. F. Grover United States Senator; and on February 1, 1877, Grover resigned as governor so that he could assume the duties of United States Senator. W. W. Thayer was elected governor at the June, 1878, election. The vote for governor was published by the speaker of the house on September 10th and Thayer "took the oath of office" on September 11, 1878. Chadwick assumed and discharged the duties of governor from February 1, 1877, the date when Grover resigned, until September 11, 1878, the date when Thayer was installed in the office. Chadwick ceased to be secretary of state on September 9, 1878, the date when he was succeeded by Earhart as secretary of state, and notwithstanding the fact that Earhart and not Chadwick was from that time on secretary of state the latter and not the former acted as governor.

The house and the senate each effected a permanent organization on September 9, 1878. On the following day D. P. Thompson of Multnomah County introduced House Joint Resolution No. 2, which reads as follows:

"Resolved, that a committee of three on the part of the House and two on the part of the Senate be appointed to wait on his Excellency, Governor R. P. Earhart, and inform him of the organization of the two Houses, and that they are ready to receive any message he may be pleased to make."

H. Green of Benton County immediately moved to amend the resolution "by striking out the word 'Earhart' and substituting therefor the word 'Chadwick.'" The motion to amend prevailed, and then the resolution, as amended, was adopted by a vote of 34 for with 23 against it. Among those voting against the resolution, as amended, was W. A. Starkweather, who was a

member of the constitutional convention. When H. J. R. No. 2 was received by the Senate that body adopted it. There was but one absentee; and all the members present voted for the resolution. It may be of interest to note in passing that the membership of the senate included at least seven lawyers. According to the journal of the house on September 11th,

"The convention was called to order by the President of the Senate, who stated the object of the convention to be to hear the biennial message of the outgoing executive, Gov. Chadwick, and also, the inaugural address of His Excellency, W. W. Thayer, Governor elect."

Chadwick delivered a message to the joint convention and then Thayer "took the oath of office" and delivered his inaugural address.

We find from an examination of the records that Chadwick, who helped to frame the Constitution, asserted that he was governor; that Starkweather by his vote as a member of the house of representatives denied that Chadwick had authority to act as governor after his term of secretary of state had expired; and that R. P. Boise, who was also a member of the constitutional convention, as a circuit judge decided that Chadwick was not entitled to the salary of governor for any part of the period from February 1, 1877, to September 11, 1878. It is a very significant circumstance that Matthew P. Deady, who was the president of the constitutional convention and afterwards became a very eminent jurist, in his Code of 1866 employs the following marginal heading for Section 8 of Article V: "*Acting* governor in case of vacancy or disability." We find members of the house of representatives, among whom were lawyers of recognized ability, expressing different views; but we also find a

majority of the members of the house affirmatively and squarely deciding that Chadwick was governor and we likewise find all the members of the senate, except a single absentee, unequivocally treating Chadwick as governor, presumably with full knowledge of the controversy that had arisen in the house and of the decision reached by a majority of the members of the house concerning the official status of Chadwick. Although the decision of the legislature does not bind the court when called upon to construe the Constitution nevertheless the views of the members of the legislature solemnly expressed at a time when the Constitution was only nineteen years old are not entirely without significance and may afford some aid. We find, however, that when the controversy was finally submitted to an appellate court the question was judicially settled by the unanimous voice of that court.

A judicial decision which is clearly and manifestly erroneous and, because erroneous, produces injustice and hardship, should, like the errors of any other tribunal, officer or person, be corrected and righted at the earliest opportunity; for the doctrine of *stare decisis* was never intended to apply to such a situation; but when a court is confronted, as we are now, with a controversy involving the construction of a section of the Constitution, and the official records of the state disclose the fact that different persons, bearing the responsibilities of public office, have in the discharge of their duties expressed variant opinions, and it appears that a legislative assembly, removed only nineteen years from the date of the adoption of the Constitution, has by unmistakable action decided that the resignation of the elected governor devolves the office of governor upon and transfers it to the secretary of state, and it is shown that an appellate court has by

a unanimous voice adjudged that the death of the elected governor devolves the office of governor upon and transfers it to the person who is secretary of state, the rule of *stare decisis* becomes peculiarly and pre-eminently applicable because it accomplishes what it was designed to accomplish, by giving to the law, as construed by the courts, the qualities of certainty, definiteness and stability. The decision rendered by the court in *Chadwick* v. *Earhart* ought to be binding upon us to the extent that it was necessary for the court to construe Article V, Section 8, in order to decide the issues presented in that litigation. Turning now to the pleadings in *Chadwick* v. *Earhart* we find that Chadwick demanded of Earhart as secretary of state a warrant for $2,420.75 to cover the salary of governor for the period, commencing February 1, 1877, and ending September 11, 1878. Earhart refused to issue the warrant. Chadwick brought a proceeding for the purpose of compelling the issuance of the warrant. The stipulation, upon which the case was tried, contained the following recital:

"Mr. Earhart objects to the salary being paid from the 9th day of September, 1878, to the 11th day of September, 1878—two days on the ground that Mr. Chadwick was not secretary of state after Mr. Earhart was sworn in on the 9th day of September, 1878, though Mr. Chadwick acted as governor until and including the 11th of September, 1878."

Thus it will be seen that the question of salary covered two periods: (1) From February 1, 1877, to September 9, 1878, or the period during which Chadwick was secretary of state; and (2) from September 9, 1878 to September 11, 1878, or the period during which Chadwick was not secretary of state. The court decided that Chadwick was entitled to the salary

of governor for both periods and hence in order to reach that decision it became necessary to construe Article V Section 8, and to determine whether Chadwick was simply *ex-officio* governor while secretary of state or whether the office devolved upon him in his natural capacity thus making him governor in truth; and since the court determined that the office of governor devolved upon Chadwick in his natural capacity making him governor in truth, that decision ought to be accepted as final and ought to govern now just as it governed then.

However, as I read it, the written opinion rendered in *Chadwick* v. *Earhart* does not decide that the people cannot elect a governor at the general election to be held in 1920 or that the person so elected cannot qualify and assume the office of governor when the speaker of the house publishes the vote in January, 1921, after the legislature convenes. Ben W. Olcott was elected secretary of state at the November, 1916, election and his term as such will expire on the first Monday in January, 1921. His successor will be elected at the November, 1920, election and such successor will assume the duties of secretary of state on the first Monday in January, 1921. James Withycombe was elected governor at the November, 1918, election and he qualified on January 14, 1919, after the speaker of the house of representatives published the vote cast for governor. James Withycombe was elected for a term of four years ending in January, 1923; but he died on March 3, 1919, and hence two regular elections will be held between the date of his death and the end of the four year period for which he was elected. In this respect the facts in *Olcott* v. *Hoff* are essentially different from the facts in *Chadwick* v. *Earhart;* for in the latter case Grover resigned

on February 1, 1877, and a governor was elected at the very first opportunity which was in June, 1878, and the elected governor assumed the duties of the office at the very first opportunity which did not occur until the speaker of the house published the vote cast for governor. When in *Chadwick* v. *Earhart* the court speaks of "the remainder of the term of the outgoing governor" reference is made to the "remainder" left after February 1, 1877; for the court was dealing with that and no other "remainder." The court was not called upon to decide, nor did it attempt to decide, whether Chadwick could have occupied the office of governor from February 1, 1875, if Grover had resigned on that date, and held it through two elections, one in 1876 and the other in 1878. As I read the opinion in *Chadwick* v. *Earhart,* no expressions appearing there or rule applied there can be found sustaining the view that the people cannot elect a governor at the next election to be held in November, 1920. When James Withycombe died, the Constitution appointed Ben W. Olcott, because he was secretary of state, governor "until * * a governor be elected," so that the office will not be without an occupant "until * * a governor be elected." If we apply to the facts presented to us the same rules that were applied in *State ex rel.* v. *Johns,* 3 Or. 533, the conclusion is unavoidable that the legal voters can, at the election to be held in November, 1920, elect a governor who can assume the office in 1921 when the speaker of the house publishes the vote cast for governor. Be it remembered, too, that it was R. P. Boise, a member of the constitutional convention, who as circuit judge decided *State ex rel.* v. *Johns* in the Circuit Court and that his reasoning was repeated with approval and that his conclusion was affirmed when the Supreme Court de-

cided the same case on appeal; and, moreover, one of the judges participating in the decision announced by the Supreme Court was P. P. Prim, also a member of the constitutional convention. The doctrines which were announced and applied in *State ex rel.* v. *Johns* were again recognized in *State ex rel.* v. *Ware,* 13 Or. 380 (10 Pac. 885), and at a more recent date followed by a majority of the court, as now constituted, in *State ex rel.* v. *Kellaher,* 90 Or. 538 (177 Pac. 944). The same rule was followed and put into practice when Ben W. Olcott was elected secretary of state at the 1912 election to succeed Frank W. Benson who had died in April, 1911, after having been elected in 1910 for the full term of four years. Suppose that Frank W. Benson had not died in April, 1911, but that he had lived and filled out his term and that Ben W. Olcott had been elected secretary of state in 1914 and re-elected in 1918 contemporaneously with the re-election of James Withycombe as governor and suppose that Ben W. Olcott should to-day resign both the office of secretary of state and governor; Would anyone be so bold as to contend that the president of the senate would be entitled to act as secretary of state and also as governor or that he could act as either until 1923? The framers of the Constitution deliberately provided for the two offices of governor and secretary of state and they intended that those offices should be occupied by different persons so long as possible; but anticipating the possibility of death, resignation or removal they provided for those contingencies by declaring that the secretary of state shall be automatically appointed governor "until * * a governor be elected." This automatic appointment is temporary and ends just as soon as the people can elect a governor at the next biennial election. When the writers of the Con-

stitution made the governor, secretary of state and state treasurer a board of commissioners for the sale of school and university lands and for the investment of funds arising therefrom they did so for the manifest purpose of bringing to the business the judgment, wisdom and experience of three men; and every one of the various subsequent acts of the legislature making these officers the constituent members of boards was framed for the same purpose. The makers of the Constitution did not intend that one person could occupy more than one of these offices any longer than was necessary.

In Article II, Section 10 we read that no person shall "hold more than one lucrative office at the same time, except as in this constitution expressly permitted." There is no provision in the Constitution expressly or by manifest implication declaring that the secretary of state shall hold the office of governor through two biennial elections; but upon the contrary the whole plan and purpose of the Constitution negatives the idea that the secretary of state can hold any longer than is necessary. The Constitution provides for the two offices of governor and secretary of state because the framers of the organic act deemed two offices necessary; one person is prohibited from holding two lucrative offices except as in the Constitution *expressly* provided, because the framers of the organic act deemed it desirable that one person hold only one lucrative office. The rule established by the Constitution is that one person can hold but one office; for one person to hold two offices is the exception. The framers of the Constitution anticipated the contingencies of death, resignation or removal by providing for the exception. The important business of the management of school and university lands and funds was

placed in the hands of three and not two persons. A board of three persons is the rule; a board of two persons is the exception. The office of governor as well as that of secretary of state is elective. An election is the rule; an appointment is the exception. Finding as we do that two offices with two persons as the officers is the rule while two offices with one person acting as the two officers is the exception, that an election is the rule and an appointment is the exception, that a board of three commissioners for the management of the school and university lands and funds is the rule, while a board with two commissioners is the exception, we would also expect to find provisions terminating the exceptions, whenever they occur, and reestablishing the rule at the very earliest opportunity. The rule was provided for because it was deemed to be the best; the exception was provided for because it was deemed to be the next best; and naturally the theory of the Constitution is that the best shall be had as long as possible while the next best shall be had only so long as necessary. As shown by the stipulation filed in *Chadwick* v. *Earhart* the "remainder" discussed and referred to in that case only covered the short period which intervened between the end of Chadwick's term as secretary of state and the commencement of Thayer's term as governor. That case as well as every case must be read in the light of the facts presented to the court. The conclusion that the office of governor can be filled by the people at the next election harmonizes every part of the Constitution with every other part, gives full meaning to every word and every section, and as said in *State ex rel.* v. *Johns* "is in perfect accord with the spirit of our constitution and laws."

There is no analogy whatever between the offices of President and Vice-president of the United States on the one hand and those of governor and secretary of state on the other. By the express language of the Constitution of the United States the President "shall hold his office during the term of four years, and, *together with the Vice-president,* chosen for the same term, be elected as follows." Our Constitution does not tie the office of governor to that of the secretary of state; nor does it tie the latter to the former. The governor is elected "at the times and places of choosing members of the legislative assembly": Article V, Section 4. Members of the legislature are elected at the general elections which are held biennially. In brief, I take the view that Ben W. Olcott is governor in truth as distinguished from governor *ex-officio;* that he is entitled to hold the office of governor and is entitled to the salary of that office until his successor is elected and qualified; and that the legal voters are entitled to elect a governor at the next election to be held in November, 1920, and that the person so elected is entitled to assume the duties of the office when the vote is published by the speaker of the house of representatives in January, 1921. I think, too, that the logic of the holding in *Chadwick* v. *Earhart* inevitably leads to the conclusion that the petitioner can resign as secretary of state and continue to occupy the office of governor.

BENSON, J., concurs.

BENNETT, J., Specially Concurring.—In this case it appears from the pleading that the petitioner, who was secretary of state at the time of the death of Governor Withycombe, and who has assumed the office

of governor, drew his warrant on the state treasurer for $336, being the salary as governor from the death of Governor Withycombe to the 1st of April. This warrant was drawn "In payment of the salary due said Ben W. Olcott, as Governor."

The defendant, the state treasurer, refused to honor this warrant upon the ground that it should have been drawn to "Ben W. Olcott, Secretary of State, Acting Governor."

It seems the legal controversy between the parties is over a mere matter of words—the one claiming the warrant should be drawn for his salary "as Governor," and the other that the warrant should have been drawn in his favor as "Acting Governor."

I do not think there is any question but what the warrant was sufficient and, therefore, in any view, should have been honored, and that the plaintiff is entitled to the relief prayed for. I therefore concur in the result of the opinion of Mr. Justice JOHNS.

The real purpose of the proceeding was, no doubt, to test questions which, as I view them, go far beyond the real question involved in the case. However important the public questions involved may be, I do not think we have any authority to go beyond the case presented to us. If we did and should decide questions not presented, our decision would be mere *dictum*, and not binding upon our successors, or even upon us individually, if we should change our individual opinion at some future date.

No doubt the power should be vested in the courts to pass upon moot questions of great public interest like this, in an authoritative way, but so far the legislature does not seem to have conferred that power. I, therefore, reserve my opinion as to the question of whether or not the petitioner will continue to hold the

office of governor personally after he ceases to be secretary of state, and as to the kindred questions urged.

In view of the opinions written by the Chief Justice, and some of the other justices, I deem it necessary to add something to the above brief expression of my views.

I do not view the authorities cited by Mr. Chief Justice MCBRIDE, in relation to our authority or lack of authority, to pass upon questions in no way involved in the case before us, as at all in point, or as giving us the slightest authority to go beyond the issues presented in this case.

In all of these cases the questions decided by the court were squarely within the issues made by the pleadings, and the decision was entirely pertinent and responsive to the actual case in litigation. In some of them the decision of the court could still be made partly or wholly effective. In others, by reason of the lapse of time or the happening of some event, between the decision of the lower court and that of the appellate tribunal, the decree in the particular case, could no longer be enforced, but the issues between the parties, which were living issues at the time of the commencement of the action, still remained. In such a case it is well settled that the appellate court may retain and decide the case, or it may, at its option, refuse to proceed further and dismiss the appeal.

The leading case cited—*Giles* v. *Harris*, 189 U. S. 475 (47 L. Ed. 909, 23 Sup. Ct. Rep. 639), belongs to the former class of cases, and the questions decided were not only clearly within the issues made by the pleadings, but were still practical living issues in the case at the time of the ultimate decision.

That case was a suit brought by a colored man in the State of Alabama, on behalf of himself and five

thousand other colored voters, against the board of registrars of Montgomery County, to secure the right of permanent registration, and also the registration for the coming election in November. Before the hearing was reached in the United States Supreme Court, that election had passed, but there still remained in the case the question of *permanent registration*. It was in such a case that the language, quoted with so much apparent assurance that it is an authority in this case, was used. The court said:

"To be enabled to cast a vote in that election is not * * the whole object of the bill. It is not even the principal object of the relief sought by the plaintiff. The principal object * * is to obtain the permanent advantages of registration."

The court denied the relief upon two grounds. Having considered the case and found against the plaintiff upon one ground, it also proceeded to consider the second ground and decide against him as to that also, and it was in this connection that the court used the language, which is referred to in the second quotation:

"We are unwilling to stop short of the final considerations, which seem to us to dispose of the case."

Here, then, was simply the common occurrence of there being *two* grounds upon which a case could be decided—*both of them squarely within the issues of the case* and the court deciding them both. In such a case, I think it is well settled that the court may dispose of the case upon one ground alone, or may properly pass upon both questions involved.

I cannot see how such a case furnishes an iota of authority, for us to go entirely outside of every issue in this case, and decide questions that are not in the case at all.

It is a significant fact in the Giles case *supra,* that one of the questions urged was, that the new Constitution of Alabama was in conflict with the Federal Constitution, and, therefore, void. No question, it would seem, could exceed such a question in public importance, yet the court refused to pass upon it, saying:

"We express no opinion as to the alleged fact of their unconstitutionality."

Another significant thing is, that the court cites with approval the previous case of *Mills* v. *Green,* 159 U. S. 651 (40 L. Ed. 293, 16 Sup. Ct. Rep. 32), in which the same court had used the following language:

"The duty of this court, as of every other *judicial* tribunal, is to *decide actual controversies* by a judgment which can be carried into effect and not to give opinions *upon moot questions* or abstract propositions, or to disclose principles or rules of law, which cannot affect *the matter in issue,* in the case before it."

The case of *Memphis* v. *Rapid Transit Co.,* cited from 133 Tenn. 99 (179 S. W. 635, Ann. Cas. 1917C, 1045, L. R. A. 1916B, 1143), was a suit by a street-car company against a jitney company, for operating jitneys in competition, the plaintiff relying upon an act of the legislature. The defendant demurred to the complaint, relying upon two grounds, one of which was that the act was unconstitutional. At the hearing it was claimed the case could be decided upon other grounds than the constitutional question, and that, therefore (under the practice in that state), the cause should have been appealed to a different court. The court held the constitutional question squarely in the case, and therefore proceeded to decide the same. It was under these conditions and in regard to such a case, that the court used the language quoted.

The case of *Boise City Land Co.* v. *Clark*, cited from 131 Fed. 415 (65 C. C. A. 399), was a case brought by a water company in Idaho against the county commissioners to annul an order fixing the rate it could charge in the year 1901 for water from its canals. The case was tried in the United States Circuit Court and appealed to the Court of Appeals. Before it could be reached for hearing in the latter court, the period for which the rates were fixed for that season had expired. Nevertheless the court proceeded to decide the case, which involved no question of general public importance, but the questions decided were all squarely within the issues and necessary to a decision.

It is one thing to decide the issues actually presented in a case, even although something has happened pending the appeal, making the judgment ineffective, and an entirely different matter to go clear outside of the issues, as we are asked to do.

In many cases, as in the fixing of rates for a particular year, or the right to vote at a particular election, it is impossible to reach a decision in the appellate courts before the party's right in the particular instance has expired; and he could never have the question, or his rights decided, if his cause should be dismissed upon that ground. In such cases the courts have always, and I think properly, exercised their discretion to dismiss the cause, or to hear and decide it, as seemed just under the particular circumstances.

The other cases of *State* v. *Stutsman*, 24 N. D. 68 (139 N. W. 83, Ann. Cas. 1914D, 776); *State* v. *Tel. Co.*, 65 Fla. 67 (61 South. 119); *Commonwealth* v. *Klaus*, 145 App. Div. 798 (130 N. Y. Supp. 713); *In re Fairchild*, 151 N. Y. 361 (45 N. E. 943); *People* v. *General Committee*, 25 App. Div. 339 (49 N. Y. Supp. 723), and *In re Morgan*, 114 App. Div. 45 (99 N. Y. Supp. 775),

cited in Chief Justice McBRIDE's opinion, are all exactly similar in principle and in questions involved, to the case of *Boise City* v. *Clark*, 131 Fed. 415 (65 C. C. A. 399), and are no more in point. It will be noticed that in every one of them there was a *real lawsuit* between real adversary parties. In no one of them did the court *go outside of the issues made by the pleadings*.

There is no case cited, and I do not think any one can be found, in which the court has deliberately and intentionally gone clear outside of the issues (as we are asked to do) and decided questions which were not and never had been in the case.

If we do this we are not following any beaten path—we have no precedents—we are cutting the fences that have marked the boundaries of proper judicial authority, ever since we have had English speaking courts. The common law never gave us any such authority. Neither did the state Constitution, nor has the legislature. Our only pretense of authority will be the invitation of public officers, who have no more statutory right to invite us to make the decision, than we have to accept the invitation.

I do not wish to quibble or to shirk my share of responsibility in deciding any question that is properly before the court. Neither am I willing to be stampeded into a decision I have no right to make, nor to rush headlong to the exercise of powers I do not possess, in order that I may have the satisfaction or the notoriety, of helping to decide some important question.

This is not a case where the questions presented have become merely academic, after the case was commenced, by reason of the lapse of time. Here the question as to who will be governor, if the secretary of state resigns, or if another governor should be

elected at the election in 1920, never was in the case, and could not be, for no such state of facts yet exists. The question may never arise. Mr. Olcott may never resign as secretary of state. He may run for governor himself at the next election.

To accept and amplify Mr. Chief Justice McBRIDE's homely illustration, this is not a case where anyone has suggested to "cut the dog's tail off by inches." It is a case where, because one dog has a broken tail, which needs amputation, we are asked to drag in the other dogs in the community and mutilate them, because their tails might, possibly, be broken at some time in the future.

If another secretary of state, elected at the next election, shall claim the office of governor, he will have a right to be heard. There will then be an actual controversy, and I think he ought not to be foreclosed, by any premature decision we may now make, in a "mock trial" on a "moot" question in an arranged and fictitious lawsuit.

As a citizen, I have a more or less well-defined opinion as to all the questions suggested here, formed partly from my own impressions and partly from the briefs of the attorney general, and those of public spirited citizens, who—at the invitation of the court—have taken enough time from their private business, to file more or less careful briefs in the case. If I should don my official robe and attempt to give my half-baked street opinions judicial utterance, I would agree with Mr. Chief Justice McBRIDE as to the result, but not as to the reasoning or analogies by which he has reached that result. On the other hand, I should agree with Mr. Justice HARRIS as to his reasoning, up to a certain point, but not as to the result reached by him. But if I should attempt to do so, some other

judge succeeding me, might properly refuse to give my opinion any binding force. He might well conclude, that it takes more than a judge and a gown, to make a judicial decision.

I shall content myself, therefore, with the expression of an opinion on the questions really in issue, and upon which, as I understand, we are all agreed.

BURNETT, J., Concurring in Part.—In this case an alternative writ of *mandamus* was issued out of this court, directed to the defendant, from which, barring a clerical omission, we learn in substance that James Withycombe, the duly elected and inaugurated governor of the state, died March 3, 1919, at which time the petitioner, Ben W. Olcott, was the duly elected, qualified and acting secretary of state and has since then continued to hold the latter office. It is further recited that on April 1, 1919, the secretary of state issued a warrant in favor of Ben W. Olcott for $336, in payment of the salary due him for service as governor of the state from March 7 to March 31, inclusive, 1919, which warrant the petitioner herein has presented to the defendant as state treasurer and the latter fails and refuses to pay the same although there is money in his hands applicable to the payment of the salary of the governor. By the writ, the defendant was required to show cause why he had not paid the warrant. On the return day the defendant demurred, not to the petition for the writ, but as the statute requires (L. O. L., § 618), to the writ itself, on the ground that it does not state facts sufficient to constitute a cause of action against the defendant.

The sole question presented is whether the defendant is right in refusing to pay the warrant in question. We have nothing to do with the petition. It has per-

formed its office in securing the issuance of the writ, for, as shown in Sections 618, 619 and 620, L. O. L., the pleadings in a proceeding by *mandamus* are the alternative writ, the demurrer or answer to the same and the demurrer or reply to the answer, and none others are allowed. They are to "have the same effect and to be construed and may be amended in the same manner as pleadings in an action."

Admitted, as it is, that the regularly elected governor died during his incumbency in office and that the petitioner here was at the time the duly elected, qualified and acting secretary of state, we are not at present concerned about whether he is performing the duties of the office of governor as *de facto* or *de jure* governor, or merely by virtue of the authority vested in him as secretary of state, or, in other words, as an alternate upon whom the Constitution imposes the functions of governor in case of the death of the latter officer. So far as public interests are concerned or the rights of the people are involved, it matters not in which of the two suggested capacities the duties and the authorities of the executive office are exercised, so they are performed. It is said in the writ:

"That under and by virtue of Section 8, Article V of the Constitution of Oregon, the office of governor and the duties thereof devolved upon the secretary of state, and that on the 7th day of March, 1919, petitioner, Ben W. Olcott, took the oath of office, and that since that time he has been and now is the governor of the state of Oregon."

This states but a mere conclusion of law and presents no issuable fact. Neither is it directly averred that the petitioner has performed any of the duties or exercised any of the powers of governor. It is presumed, however, that official duty has been regularly

performed, whether it be that of the secretary of state or that of a successor to a deceased governor. Indeed, it may well be doubted whether an auditing officer can assume to pass upon the amount or quality of service of any individual upon whom official duties have been cast by operation of law.

Coming to the precise question of whether the petitioner is entitled to the salary which otherwise would have been paid to the elected governor had he survived, the rule is well stated in *Preston* v. *United States* (D. C.), 37 Fed. 417, 418, thus:

"If there be no incompatibility between the respective duties of the two offices or employments and the functions of each are separate and distinct, he is entitled to recover two compensations."

Article V, Section 8, of the Constitution reads thus:

"In case of the removal of the governor from office, or of his death, resignation or inability to discharge the duties of the office, the same shall devolve upon the secretary of state; and in case of the removal from office, death, resignation or inability, both of the governor and secretary of state, the president of the senate shall act as governor until the disability be removed, or a governor be elected."

Whatever view may be taken of this clause of the fundamental law, as to the capacity in which the petitioner shall administer the duties of the chief executive, it is plain that by force of the Constitution itself the duties of the two offices are not incompatible with each other, however separate and distinct they may be. In other words, the Constitution itself casts the performance of the duties of both offices upon the same individual under certain circumstances, with the result that they are constitutionally compatible with each other. Under such circumstances, the extra duty hav-

ing been performed, as we must presume it has been, the petitioner is entitled to the compensation which the law provides for such service. As stated by Mr. Chief Justice BIGELOW in *State ex rel.* v. *La Grave,* 23 Nev. 216 (45 Pac. 243, 35 L. R. A. 233):

"Another reason that may be offered for this conclusion is that it is a general principle of justice and right that when one regularly performs the duties of an office he should be entitled to the emoluments thereof."

In *United States* v. *Saunders,* 120 U. S. 126 (30 L. Ed. 594, 7 Sup. Ct. Rep. 467), the claimant drew a salary as clerk of a committee of Congress and likewise as clerk in the President's office. The duties of the two were held not to be incompatible and hence his claim was allowed for both salaries. In *State* v. *Roddle,* 12 S. D. 433 (81 N. W. 980), the defendant was a secretary of state and likewise was made by a statute a member of the state committee on brands and marks, carrying with it an additional compensation, and it was held that he was entitled to both emoluments. Similarly, in *State ex rel.* v. *Walker,* 97 Mo. 962, the individual who held the office of secretary of state and was also a member of the board of equalization was allowed pay for both positions. In *Scranton School District* v. *Simpson,* 133 Pa. St. 202 (19 Atl. 359), and in *McCauley* v. *School District,* 133 Pa. St. 493 (19 Atl. 410), the occupant of the office of city treasurer, who was *ex-officio* treasurer of the school district, was allowed the statutory compensation for both positions. The same doctrine is taught in *United States* v. *McDaniel,* 7 Pet. 1 (8 L. Ed. 587); *United States* v. *Ripley,* 7 Pet. 18 (8 L. Ed. 593); *United States* v. *Felleborn,* 7 Pet. 28 (8 L. Ed. 596), and in *Milnor* v. *Metz,* 18 Pet. 221 (10 L. Ed. 943). In *Love*

v. *Baehr,* 47 Cal. 364, the attorney general, to whom was allowed by law a statutory salary, was also made a member of the board of examiners, carrying with it a special additional compensation, and he was sustained in his claim for both emoluments. *In re Conrad,* 15 Fed. 641, is a case where the same individual was claiming fees as chief supervisor and as a United States commissioner, and his claim was sustained; and in *Smith* v. *Waterbury,* 54 Conn. 174 (7 Atl. 17), the city attorney had a salary allowed to him by law and a statute allowing him certain fees for special services was sustained. In other words, the common-sense principle is that he who performs services enjoined upon him by law is entitled to the compensation provided by the same law for those particular services, in the absence of anything restricting the emolument to a single office.

It is true that Article II, Section 10, of the organic law declares that:

"No person holding a lucrative office or appointment under the United States or under this state shall be eligible to a seat in the legislative assembly; nor shall any person hold more than one lucrative office at the same time, except as in this constitution expressly permitted."

This must be read in connection with Article V, Section 8, already quoted. If the latter section be construed to invest the petitioner with the office of governor both *de facto* and *de jure,* it would constitute an exception within the meaning of Section 10 of Article II. On the other hand, if it be held that he is merely exercising functions of the office of secretary of state visited upon him on account of the death of the elected governor, he would not be holding more

than one lucrative office within the meaning of the latter section.

This disposes of the question presented by the pleadings for our consideration. All else respecting the length of time the petitioner shall perform the duties of governor or whether he has authority to resign the office of governor or resign the office of secretary of state and continue to hold as governor, or whether he can obstruct the order of succession provided by Section 8 of Article V by appointing a secretary of state to succeed himself, is not presented by the instant record, and any attempt to dispose of these matters in this proceeding would be gratuitous *dictum*. The only excuse for discussing those questions is found not in any allegation even of the petition itself and much less in the writ which is the primary pleading, but only in the last clause of the prayer of the petition, as follows:

"And this petitioner particularly prays that this court will define his duties and powers in relation to the office of Governor."

Nowhere in the record does the petitioner intimate any desire for advice or decision about his right to resign any office or concerning the length of time he will be required or permitted to exercise its functions. As already pointed out, the petition is no part of the pleadings: *McLeod* v. *Scott*, 21 Or. 111 (26 Pac. 1061, 29 Pac. 1); *Elliott* v. *Oliver*, 22 Or. 44 (29 Pac. 1); *Shively* v. *Pennoyer*, 27 Or. 33 (39 Pac. 396). The clause of its prayer, if indeed we may consider it at all, amounts simply to a request for the court to give counsel to the petitioner on a question not presented by the record. It does not call for any decision. It is said in Section 957, L. O. L.:

"Any judicial officer may act as an attorney in any action, suit or proceeding to which he is a party or in which he is directly interested. A judge of the county court or justice of the peace, otherwise authorized by law, may act as an attorney in any court other than the one of which he is judge, except in an action, suit or proceeding removed therefrom to another court for review; but no judicial officer shall act as attorney in any court, or otherwise, other than as in this section allowed. * * "

In effect, at least, if we undertook to advise the petitioner concerning "his duties and powers in relation to the office of governor" we would violate this provision of the statute. Moreover, as declared in Chapter 196, Laws of 1915, it is the function of the attorney general when requested to do so by any state official, to give his opinion in writing upon any question submitted to him in which the State of Oregon may have an interest, and he shall, when requested, give legal advice to any of said officials, boards or commissions. For this court or its members to give such counsel as the petitioner in his prayer requests would be to usurp the functions of the attorney general in contravention of Section 1 of Article III of the Constitution, dividing the powers of government into three separate departments, the legislative, the executive, including the administrative, and the judicial, and forbidding any person charged with official duties under one of these departments to exercise any of the functions of another. All we are called upon by the record before us to decide is the issue of law presented by the demurrer to the writ. All beyond that would be unwarranted and would not bind anyone. We could not compel the petitioner to resign either the office of secretary of state or of governor, nor could we restrain him on the record from doing either of those acts, any

more than we could direct him in the care of his children or the investment of his money. It would present a situation thus described in 3 Words & Phrases, 2052:

"The mere *dictum* of a judge is not the decision of a court. There is nothing authoritative in a case except what is required to be decided to reach the final judgment, and what, by the judgment, becomes *res adjudicata* between the parties as to the subject matter of the suit. *Love* v. *Miller,* 53 Ind. 294 (21 Am. Rep. 192). 'An *obiter dictum* is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it. Old Judge'—taken from the title page of a work on 'Obiter Dicta,' published by John D. Allen; New York, 1885: *Hart* v. *Stribling,* 25 Fla. 433, (6 South. 455, 456.)"

For these reasons I concur in the direction that a peremptory writ issue commanding the state treasurer to pay to the petitioner the amount of the warrant in question; but I object to the gratuitous statement in the opinion of Mr. Justice JOHNS about the length of time the petitioner may discharge the duties of the chief executive of the state, as not within the issue presented by the record and not even requested by either party.

Argued January 30, reargued March 26, reversed and remanded April 22, rehearing denied June 17, 1919.

SCHNEIDER *v.* TAPFER.

(180 Pac. 107.)

Evidence—Hearsay—Statement in Defendant's Absence.

1. In action for alienation of affections of plaintiff's wife by defendant, her father, testimony of a witness regarding wife's statement, made in defendant's absence that defendant had given her money with which to procure an abortion was hearsay and inadmissible.

Husband and Wife—Action for Alienation of Affections—Evidence Admissible.

2. In action for alienation of affections of plaintiff's wife by defendant, her father, testimony to the effect that defendant had approved of abortion by wife *held* irrelevant to issues involved in the case.

Evidence—Action for Alienation of Affections—Admissibility of Hearsay.

3. In action for alienation of affections of plaintiff's wife by defendant, her father, testimony of plaintiff that his wife had told him before the marriage that her father and mother wanted her to quit plaintiff altogether was hearsay and incompetent, being made four years before wife finally left plaintiff.

Husband and Wife—Alienation—Declarations of Alienated Spouse—Admissibility.

4. Declarations of alienated spouse, made prior to alienation in the absence of defendant, are admissible when they tend to disclose affection and the relations between the spouses.

Husband and Wife—Alienation—Declarations of Alienated Spouse—Admissibility.

5. Declarations of alienated spouse, made in defendant's absence, are admissible when made at or approximately before alienation, where they are of a character likely to disclose the mind and motive of the alienated one and the effect on his or her mind or motive which the supposed words or conduct of defendant has had.

Husband and Wife—Alienation—Declarations of Alienated Spouse—Admissibility.

6. Where declarations of alienated spouse, made in defendant's absence, are not of a character which bear upon the mental state or motives of the alienated spouse, and where they are unaccompanied by any declarations upon her part which bear upon her mind or motive, they are wholly inadmissible.

Husband and Wife—Action for Alienation of Affections—Evidence Admissible.

7. The judgment-rolls in actions brought by defendant, father of plaintiff's wife, against plaintiff and wife after the culmination of the acts of alienation complained of, were inadmissible, being offered for the apparent purpose of showing malice on the part of defendant and that he was engaged in a general scheme to bring about plaintiff's ruin.

Husband and Wife—Alienation of Affections—Elements of Wrong.

8. In action for alienation of affections of plaintiff's wife by defendant, her father, plaintiff must prove: First, that defendant did actually alienate; and, second, that his action was malicious.

[As to action for alienation of affections by parent, see note in Ann. Cas. 1917E, 1017.]

Appeal and Error—Jury Findings—Review.

9. The court on appeal has no right to review the jury's findings upon the weight of the evidence.

Appeal and Error—Verdict Based on Possibility—Reversal.

10. Evidence which merely suggests a suspicion or possibility does not bring the case within Section 3 of the amendment to Const. 1910, Article VII, providing that no fact tried by a jury shall be re-examined unless there is no evidence to support the verdict, and a verdict based on such evidence cannot be permitted to stand.

BEAN, J., dissenting.

From Multnomah: T. E. J. DUFFY, Judge.

In Banc.

Plaintiff was the son-in-law of the defendant. In September, 1916, plaintiff's wife left him and went back home to her father. Plaintiff brings this action against the father to recover damages for the alleged alienation of his wife's affections. He obtained a verdict and judgment against the defendant for the sum of $14,000, from which the defendant appeals, alleging error in certain rulings of the court below upon the admission of testimony, and also in refusing to grant defendant's motion for a judgment of nonsuit.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Joseph Van Hoomissen, Mr. Arthur I. Moulton* and *Mr. J. W. Oberender,* with oral arguments by *Mr. Hoomissen* and *Mr. Moulton.*

For respondent there was a brief with oral arguments by *Mr. Wallace McCamant, Mr. Charles J. Schnabel* and *Mr. J. B. Ofner.*

BENNETT, J.—Appellant's first assignment of error has reference to the ruling of the court, permitting a witness to testify to a talk she had with plaintiff's wife, concerning which the witness stated:

"Well, in several ways she generally used to speak in regard to her husband, and she always spoke very

well of Mr. Schneider, and that they got along very happily together."

We do not think there was any error in the ruling of the court upon this question. It is well settled that, in a case of this kind, the plaintiff is permitted to show the declarations of his or her spouse, while they were living together, or about the time of their separation, where such declarations tend to disclose the relations of the husband and wife, and the feelings and motives of the husband or wife, whose affections are alleged to have been alienated: *Hilliers* v. *Taylor,* 116 Md. 165 (81 Atl. 286); *Nevins* v. *Nevins,* 68 Kan. 413 (75 Pac. 492); *Tucker* v. *Tucker,* 74 Miss. 93 (19 South. 955, 32 L. R. A. 623); *Bailey* v. *Bailey,* 94 Iowa, 598 (63 N. W. 341); *Knapp* v. *Wing,* 72 Vt. 334 (47 Atl. 1075).

1, 2. The second assignment of error refers to the ruling of the court regarding the wife's statement, in the absence of the defendant, as to the matter of an abortion, just previous to her leaving home, to which the witness had testified as follows:

"Yes, when I went to work for Mrs. Mary Schneider, she was sick, and I asked her what was the matter. She told me she had went and had an abortion performed. I said she should not do it, and she said, 'Well, I don't want any more children. My husband, Jake Schneider, I told him so and I asked for money to go to the doctors and he refused to give me any at all.' She said 'I went to papa and told him and *he gave me the money and told me to go.*' "

To this the counsel for defendant objected, as follows:

"I object to what Mrs. Schneider told this woman, Tapfer told her. That is clearly hearsay evidence."

"The Court: I am inclined to think so."

"Counsel for defendant: The objection is, that this witness is endeavoring to testify to declarations made by Mary Schneider to her, regarding conversations which she claims Mr. Tapfer had with his daughter upon matters which do not touch upon motives in this suit at all. It does not touch upon the marital happiness of these parties."

"The Court: The objection is well taken."

"Attorney for defendant: I would like to ask that the jury be instructed to disregard that."

"The Court: I will take that up later. It may be this testimony will be admissible."

However, the court did not take this up again and the testimony was permitted to stand.

In the refusal or neglect of the court to instruct the jury to disregard this evidence, there was clearly error, if the appellant is in position to take advantage of the same. The testimony did not in any way tend to show a happy married relationship between plaintiff and his wife, or to show her state of mind in regard to leaving the plaintiff, or that her father had anything to do with that state of mind.

It was simply evidence which tended to debase and degrade the defendant, by causing the jury to believe he had approved of his daughter's criminal abortion. Evidence could hardly have been offered which was more irrelevant to the issues involved in this case, and certainly none could have been offered, which was more likely to inflame and prejudice the minds of the jury against the defendant. It was utterly incompetent to prove that the defendant had approved the abortion by such hearsay testimony, and even if he did approve it, it was not such an action as had any natural tendency to alienate the wife's affections. The court should, very promptly, and in clear and ex-

plicit words, have instructed the jury to disregard the same.

We say this, in view of the new trial of the cause; although it is doubtful, if the appellant made such exception to the action of the court, as to be in a position to take advantage of the error here.

3. The third assignment of error pertains to a conversation about which plaintiff himself was testifying, which was supposed to have taken place before the marriage of plaintiff and his wife. Plaintiff, having testified that he had a conversation with his wife, was asked:

"Q. What was said there?
"A. Well, she told me all about it."

Here counsel objected:

"I object to that, what was said. Mr. Tapfer was not there and I object to that as incompetent testimony and hearsay evidence. He was not present and what she told him is not admissible.

"The Court: I think it is admissible under the first former ruling that the court made." To this ruling there was an exception—"and she answered, 'She told me her father and mother wanted her to quit altogether. She said she wouldn't do it.' We were talking around there for quite awhile and I left again."

We think the court erred in admitting this testimony. It was hearsay testimony. The declarations of plaintiff's wife, in regard to her father's supposed feelings, before they were married. It certainly did not tend to show happy married relations between plaintiff and his wife, or to throw light upon her motive in leaving him four or five years afterward. It was a mere narrative of her father's feelings toward plaintiff before they were married, evidently offered for the purpose of showing, that he might be *likely* to

interfere with the relations of plaintiff with his wife after they were married, and thereby to strengthen the inference, that he *had* interfered with her relations and affections, when she finally did leave her husband, four years afterwards. The testimony was hearsay and incompetent.

4, 5. In this connection, as the case will go back for another trial and these questions will all arise again, it may be proper to define what the rule is in a case of this kind as to the declarations of the alienated spouse in the absence of the defendant.

Such declarations, when made prior to the alienation, are always admissible, when they tend to disclose affection and the relations between the spouses. As for instance, if he or she should say to the other, "I love you devotedly," or "We are very happy together." Such declarations are also admissible when they are made at, or approximately before, the alienation, where they are of a character likely to disclose the mind and motive of the alienated one, and the effect upon his or her mind or motive, which the supposed words or conduct of the defendant has had. To illustrate, if a wife should say to her husband, being about to leave him,

"I can't live with you any longer. My father does not want me to, and he has said so much it has caused me to dislike you. He says if I continue to live with you he will disinherit me, and I can't give up my heritage in that way."

Such a declaration would be admissible; not, of course, for the purpose of showing that her father really had said those things, but for the purpose of showing that the acts of her father (which must be proven by other evidence) had affected *her* mind, alienated her affections, and caused her to leave her

husband. Sometimes such declarations may be admissible, when accompanying the act of leaving, as a part of the *res gestae* of the act. This is the general effect of the authorities cited in respondent's brief upon this branch of the case.

6. But where the declarations are *not of a character which bear upon the mental state or motives of the alienated spouse,* and where they are unaccompanied by any declarations upon her part which do bear upon her mind or motive, they are wholly inadmissible: *Westlake* v. *Westlake,* 34 Ohio, 634 (32 Am. Rep. 397); *Brison* v. *McKellop,* 41 Okl. 379 (138 Pac. 154); *Cochran* v. *Cochran,* 196 N. Y. 91 (89 N. E. 470, 17 Ann. Cas. 782, 24 L. R. A. (N. S.) 160); *Magers* v. *Magers,* 143 Iowa, 750 (123 N. W. 330); *Miller* v. *Miller,* 154 Iowa, 344 (134 N. W. 1058); *Phelps* v. *Bergers,* 92 Neb. 855 (139 N. W. 632).

In *Westlake* v. *Westlake,* 34 Ohio, 634 (32 Am. Rep. 397), the court said:

"Did the court err in permitting the declaration of the husband made in the absence of the defendant, to the plaintiff, that the defendant was doing all he could to bring about a separation between the plaintiff and her husband? We think it did. This was clearly hearsay testimony and nothing else. In an action for enticing away the plaintiff's wife the declarations of the wife are not admissible in evidence."

In *Brison* v. *McKellop,* 41 Okl. 379 (138 Pac. 154), the action was brought by the wife against her husband's mother, and the court said:

"The plaintiff was permitted, over the objections of the defendant, to state what her husband had told her that his mother had said to him such statements having been made some three months after the separation between plaintiff and her husband, and in the absence of either of defendants. * * The testimony of plain-

tiff herself, which was duly excepted to, was clearly incompetent and decidedly prejudicial to the rights of defendants."

In *Magers* v. *Magers*, 143 Iowa, 750 (123 N. W. 330), it is said:

"The plaintiff was permitted to testify that her husband told her the defendant had asked him to put plaintiff in a sanitarium, and had employed Dr. Taft to take her there. The testimony was clearly hearsay, and not admissible under any authority. It was no part of the *res gestae*, nor did it in any way indicate the mental attitude of T. F. Magers towards the plaintiff. That all of the testimony which we have quoted was extremely prejudicial to the defendant is at once apparent."

In *Cochran* v. *Cochran*, 196 N. Y. 86, 91 (89 N. E. 470, 472, 24 L. R. A. (N. S.) 160, 17 Ann. Cas. 782), it is said:

"On the strength of these rulings, and without unnecessary repetition of similar objections which defendants' counsel had the right to assume would be overruled, the plaintiff was allowed to give other testimony of statements made by her husband, with reference to the hostile attitude and disposition of his parents.

"We think it is unnecessary to take time for the purpose of arguing that this evidence was very prejudicial to the defendants, and we know of no authority which justified its introduction. While of course plaintiff was required to prove the unlawful conduct of defendants, and while such unlawful conduct might be evidenced by such acts as were outlined in the evidence referred to, it was incumbent upon her to prove the same by competent testimony, and it was not proper to give evidence of her husband's declarations on the subject. Such evidence offended against the general rules of evidence and has been specifically condemned in actions similar to this one: *Huling* v. *Hul-*

ing, 32 Ill. App. 519; *White* v. *Ross*, 47 Mich. 172 (10 N. W. 188); *Preston* v. *Bowers*, 13 Ohio St. 1 (82 Am. Dec. 430); *Manwarren* v. *Mason*, 79 Hun, 592 (29 N Y. Supp. 915)."

The cases cited in the brief of the learned attorneys for respondent, except the case of *White* v. *White*, 140 Wis. 538 (122 N. W. 1051, 133 Am. St. Rep. 1100), appear to be cases where the particular declaration of the alienated spouse, was of such a character, as to throw light upon her own conduct and feelings. The case of *White* v. *White* seems to disregard this distinction, and to sustain the admissibility of such declarations, even where they have no reference whatever to the state of mind of the husband or wife making the same. We cannot follow the doctrine of that case. It is in direct conflict with the decisions we have already quoted, from Ohio, Oklahoma, Iowa, Nebraska and New York, and, as we view it, is contrary to the general and well-established principles of evidence.

Such declarations of the alienated spouse are hearsay in their nature, and are a very dangerous character of evidence, and should only be admitted, when they clearly bear upon the relations of husband and wife, or on the motives and mental condition of the alienated spouse, and then the court should clearly inform the jury that they were admitted for that purpose only.

7. The fourth and fifth specifications of error, refer to the introduction of the judgment-roll of the action, brought by the defendant against the plaintiff and his wife, to recover the sum of $846 upon a promissory note, and the judgment-roll in the action of replevin brought by defendant against plaintiff, to recover the possession of certain property under the mortgage.

Each of these were introduced over the objection of the defendant, that they were incompetent, irrelevant and immaterial. In this we think there was error. They were offered apparently for the purpose of showing malice upon the part of the defendant, and that he was engaged in a general scheme to bring about plaintiff's ruin.

At the time of the objection the purpose was stated by one of the attorneys for plaintiff, as follows:

"We have made an allegation that he was trying to prejudice this boy in the eyes of his wife by bringing about his financial ruin, and the defendant has alleged that he had a very fatherly interest in this young man and his welfare, and we wish to introduce these records for the purpose of enabling the jury to determine just what that fatherly interest consisted in."

The court seems at first to have thought these records not admissible, but finally admitted them, and exceptions were taken.

Both of these actions were brought after plaintiff's wife had refused to live with him, and had gone to live with her father, and after she had brought her action for divorce against the plaintiff. Both of them were apparently properly brought, for it is admitted and the record shows that in each the defendant herein prevailed and obtained judgment.

It is questionable, if the prosecution of an admittedly just claim can ever be made evidence of malice, but at all events in this case, these proceedings were too remote. They have no reference or direct connection with this proceeding, and were brought after the culmination of the acts complained of in plaintiff's complaint.

In *Stamper* v. *Raymond*, 38 Or. 16, 30 (62 Pac. 20, 24), the action was for malicious prosecution. The

court had permitted the introduction of evidence as to a previous controversy and trouble, a year or more previous to the transaction in question, and the court held this was error.

Judge WOLVERTON, delivering the opinion of the court, said:

"These negotiations and transactions may have had the tendency to show malice on the part of Raymond against Stamper, but they involved a further inquiry as to who was in the right during their pendency, as, *if Raymond was in the right, malice could not be imputed to him from the mere instituting* of the civil proceedings alluded to. * * In the endeavor to show malice in cases of this nature, large latitude is usually indulged; but it is necessary that the inquiry should have some perceptible relation to the controversy which led directly to the alleged malicious prosecution—some connected bearing—so that it can be said that the malice which induced the one, or was manifested thereby, has been harbored for a new opportunity to arise, whereby he may again give rein to such impulse, prompted by a perpetuation of the same motive, and that the present was the opportunity for which he had been seeking. It does not seem to us that such an inference is reasonably deducible from the premises. The transaction of 1898 appears to have been closed by the discharge of the attachment and a dismissal of the suit for a receivership, and had remained closed, for aught that appears, for nearly a whole year, and until another crop had been produced, to which the new conditions wholly related. Under such circumstances, we are of the opinion that the transactions of 1898, and prior thereto, *were too remote and disconnected to be relevant for the purpose of showing malice in the transactions concerning the crop of 1899, and should not have been allowed, for that reason, to go to the jury.*"

In *McLain* v. *Burdette*, 174 Ky. 592, 596 (192 S. W. 648, 649), there was an attempt to introduce a threat-

ening letter written by the defendant to the plaintiff, and the court said:

"The cause of action relied on by plaintiff was the alienation by the defendants of the affections of his wife, and to this cause of action the evidence, as well as the instructions, should have been confined. If Mrs. Burdette wrote to McLain a threatening letter, this might furnish the basis of a prosecution against her, or possibly ground for a civil action in his behalf, but we do not understand how a threatening letter written to him could have operated to alienate the affections of his wife."

In *Allcock* v. *Allcock*, 174 Ky. 665, 670 (192 S. W. 853, 855), there was an action for alienation by the wife against the husband's mother, and there was an attempt to show that the mother-in-law, defendant, had tried to force the plaintiff and her husband, to give her a deed or mortgage on their residence property, and that in the conversation, at which all three were present, the husband had said to the plaintiff if they did not give the mortgage, his mother would put them out of the house. The court said:

"The presumption is authorized that appellant's husband was owing his mother, as claimed by the latter, and, if so, her request for the mortgage as security for the debt *was what she, as a creditor, had the right to demand under the circumstances.* In this view of the matter, we are unable to perceive how the transaction circumstantially tends, even in the remotest degree, to show, as claimed by appellant's counsel, any purpose on the part of appellee, to create dissension between her son and his wife, or a malicious intent on her part to alienate his affections from the wife."

It is true that the mere fact of litigation between two parties, pending at the time of the principal transaction, or immediately before, is sometimes admissible

to prove malice or hatred, without regard to the justice of the claims on one side or the other. This is not because such litigation, where the claim of the party in question is just, is proof of any *previous* malice, but because, according to the laws of human nature, the fact of such controversy in the courts, is, of itself, *likely to produce more or less dislike,* on both sides, and, therefore, such prior or impending litigation, bears upon the probability of present malice or motive.

In the same way in a case of homicide, the state may generally show *previous* controversies and altercations, even though the defendant may have been entirely in the right, and may even have been wantonly assaulted by the other party, in the previous controversy. But no one would suggest that in an assault and battery case, a *subsequent* controversy, where the defendant had been assaulted, and was entirely in the right, could be introduced. It would not then tend to show motive on the part of defendant for the previous assault.

The cases cited by appellant are all cases where the litigation was pending at the time of the principal event, or was prior thereto, and generally they are cases where the previous litigation had some direct connection with the controversy involved.

Murphy v. *People,* 63 N. Y. 591, involved a charge of murder—the witness was wounded by the same shot which killed deceased—and it was a theory of the state that the shooting was directed toward him, and the killing of the other party an accident—the previous suit about which evidence was offered was to set aside deeds *to the witness* from his wife (defendant's sister). The suit was actually pending at the time of the homicide and was to come up for trial the *ensuing*

Monday. Of course the evidence was clearly admissible to show motive.

Turner v. *State,* 33 Tex. Cr. R. 103 (25 S. W. 635), was also a murder case, and the proceeding about which evidence was offered was an injunction suit brought by deceased against defendant, which was *then pending* at the time of the homicide, and the evidence was admitted to show probable feeling and *animus.*

The case of *Clark* v. *Folkers,* 1 Neb. (Unof.) 96 (95 N. W. 328), was for malicious prosecution, and the suits in relation to which evidence was offered were brought between the parties, just prior to the prosecution in question, and were then pending.

State v. *Zellers,* 7 N. J. Law, 220, was a murder case at *nisi prius.* The lawsuits, about which evidence was introduced, were prior to the murder and were in relation to the same land the parties were quarreling about at the time of the killing.

None of these cases are authority for the admission of the record in subsequent cases, brought by the defendant upon debts which are conceded to have been justly and actually due, from the plaintiff to the defendant at the time.

It is true that the bringing of these other lawsuits, was pleaded in the complaint of the plaintiff, and it is urged that they became material for that reason, but we do not think this fact affects the question. The allegation in the pleading was mere surplusage. The plaintiff's action was for alienation of affection, and not for the malicious prosecution of civil suits, and if the plaintiff could have joined the two together, it would have been necessary to have alleged that the litigations in question were unjustly brought. This

was not done and it is conceded that no such allegation could have been truthfully made.

It is also urged that the alienation of Mrs. Schneider's affections was a continuing operation, and was not finally completed, until after the commencement of the litigations offered in evidence. And to support this theory respondent refers to the following clause in the complaint:

"And since said time, acting under the wrongful, unlawful, and malicious advice, direction and influence of the defendant, the wife has wholly refused to recognize the plaintiff as her husband, or live with him, and has refused and *now refuses* to return to plaintiff's home."

But this allegation follows immediately after the allegation, that—

"During September, 1916, and for a long time prior thereto, the defendant wrongfully contriving and unjustly contending * * did so prejudice and poison the mind of the wife against plaintiff, and so *alienate her love and affection* from the plaintiff, that the wife, acting upon the wrongful and malicious advice and under the direction of the defendant, did, *during September, 1916*, leave the plaintiff and his home and returned to the home of defendant."

Under these allegations we think it is apparent that the alienation must be considered as having occurred in September, or at least not later than the commencement of the divorce proceedings, which was October 3d. The litigations offered in evidence were commenced October 25th and November 20th respectively.

Besides, there is not the slightest intimation in the testimony, either direct or circumstantial, that the defendant ever did anything, or said any word, toward alienating the wife's affections, after October 25th, the

date of commencing the first of these litigations. We think, therefore, these litigations commenced October 25th and November 20th, could not have furnished any motive for alienating the affections of plaintiff's wife in the September before.

The case of *Tucker* v. *Tucker,* 74 Miss. 93 (19 South. 955, 32 L. R. A. 623), is cited by respondent, for the proposition that statements of the defendant, made after the alienation, may be admissible to show motive. That case does not seem to be very fully reported, and it does not appear just what the subsequent statements of the defendant were.

Of course it is obvious that a party might make subsequent statements, which would be of such a character as to go back and tend to show what his feelings and motives were, prior to the alleged alienation. But we think the bringing of a litigation, subsequent to the alienation of the wife's affections, by the defendant upon a claim which is then legally due, is not admissible.

There is one other very important question involved in this appeal, namely: whether or not there was any evidence of any interference on the part of the defendant, which might have alienated the affections of plaintiff's wife.

8. The defendant was the father of plaintiff's wife, and it is elementary in cases of this kind that there are two distinct elements of the wrong, which plaintiff must prove, before he is entitled to recover. First: That the defendant *did actually alienate* the affections of the plaintiff's spouse, and, second, that his action was malicious—that is, intended to injure the plaintiff and being calculated to bring about the alienation.

9. There was evidence offered on behalf of plaintiff, tending to show a dislike toward him on the part of the defendant, and while the evidence is very conflicting as to that, the jury may have concluded that he had such a dislike toward the plaintiff, as would justify a finding of malice. If it had been proven that he actually did *alienate his daughter's affections from her husband,* and there being evidence of malice, the verdict of the jury would be binding upon us. We would have no right to review its findings upon the weight of the evidence. But the close question is, whether there was any competent legal evidence, that the defendant did actually interfere wrongfully between plaintiff and his wife, and thus bring about the alienation.

The plaintiff's married life with defendant's daughter had been a more or less troubled and tumultuous one. Starting out with an elopement, brought about by their mutual indiscretions, the young couple went first to Denver, Colorado, where the plaintiff worked at such employment as he could obtain. After living there about five months they returned to the Pacific Coast and worked around for a year or two. Part of the time they were working at different places, the wife being engaged as a domestic, while the husband worked from place to place. Part of this time their oldest child was left in a baby home near Portland. Afterwards they worked for about a year for the wife's father (defendant herein). Then plaintiff engaged in a dairy business for himself and was operating said business at the date of the separation involved in this action.

The wife testifies that their life together was a constant succession of quarrels; that plaintiff was jealous of other men, and frequently accused her of being too

friendly with such men; that he was uncleanly in his person, brutal in his sexual desires, and required her to work constantly at hard manual labor. Most of this is disputed by the plaintiff, who testified that they generally got along well together, and in this he is corroborated, to some extent, by the testimony of other witnesses. However, he admits they had trouble a year or two before, at a time when he claims to have found her kissing a tramp whom he had employed, and that about three or four months afterward, they had another quarrel over this same man, and she left him and went home to her father and mother and stayed until her mother, at his request, made her go back to him. He also admits that shortly before she left the last time, he had some disagreement with her about the abortion which she had, or was about to have, performed.

We find no direct evidence in the record of any action or word, on the part of the defendant, directed toward inducing plaintiff's wife to leave him, or diverting her affections. The only direct evidence is that of plaintiff's wife and her father and stepmother, and that is to the negative. The wife testifies, in relation to the final trouble, that she had gone to a lawyer to see about a divorce in February before.

"I had simply got utterly disgusted and tired of his everlasting quarreling and his disposition and actions towards me, and I felt I couldn't stand it any longer.

"Q. But you did not leave him at that time?

"A. No, sir; on your advice I went back to him again.

"Q. Why did you leave him the last time?

"A. Because he had gotten me into the family way, and I had an abortion performed, and he had called me a murderess, and treated me without any consideration whatever, and he demanded me to work just as

hard after that operation, as when I was in perfect health, and I was so worn down and run down and sick that I couldn't stand it to live with him any longer, and that was the reason I left.

"Q. Why did you have that operation performed?

"A. Because I felt we could not live our lives out together, and I thought it would be a sin to bring another child into the world, in the way we were living, and that the best thing to do would be to have an operation performed. Two children in such an unhappy family was the greatest plenty. * *

"Q. Did your father have anything to do with it?

"A. Nothing at all."

The defendant himself testified that he had nothing to do with his daughter's leaving and coming home; that he was about to be married again and that he was afraid it might make trouble at his own home if she came there.

"Q. What action, if any, did you take to have Mary come out to your place?

"A. I did not take any. She asked me if she could come out to my place. * * She said, 'Papa, I have got a good mind to go out with you' and I said 'You can if you want to.'

"Q. Was Mr. Schneider there?

"A. He certainly was. I was sitting right in his presence. He asked me (afterwards) to ask his wife to come back to him, which I certainly did, even before he ever came out and after I found out what the girl had done and what her intentions were. * *

"Q. Why did you want your daughter to come (back)?

"A. Well, because I didn't think it was right in the first place on account of the children, and in the second place in the position I was in. I was engaged to be married and I did not think it was right for her to come in with a stepmother. It is no place for two women under one roof."

And the testimony of Mrs. Tapfer is to the same effect.

If there is any evidence to the contrary it is purely circumstantial. However, circumstantial evidence is sufficient to establish this, or any other fact, providing the circumstances point in that direction and are sufficient, so a reasonable man *might* reason from such circumstances and justly reach that conclusion.

The circumstances relied upon by the plaintiff, to prove that the defendant actually did interfere, are: First, that he was present at plaintiff's home the day before plaintiff's wife left; second, that he had talked with her in German at that time; third, that he then invited the wife to visit him at his home and to bring her two children; fourth, that about that time he gave her $20 to pay on the doctor's bill on account of her abortion; fifth, that the wife went with him to his home and remained there; sixth, that afterward the litigations were brought by the defendant, to which we have already referred; seventh, that the wife told her husband, and others, that the defendant had threatened to disinherit her if she continued to live with plaintiff; eighth, that the wife had told the plaintiff, and others, that her father knew about the abortion and, in substance, approved of the same; ninth, that at one time when plaintiff went over to defendant's home to see his wife, defendant told him she had gone to town, and that she herself afterwards told plaintiff that she had *not* gone to town, but was working at another place about one and a half miles from her father's house.

All of the circumstances and matters in relation to the abortion may be eliminated, first, because there is no proof whatever that the defendant ever knew anything about the proposed abortion until *after* it was

performed, except the alleged statements of his daughter in his absence, which statements, as we have already seen, were hearsay and entirely incompetent to connect him with the operation. The fact, testified to by one witness, that after the abortion he gave his daughter $20 to pay the doctor's fee, assuming that he did do so (which both of them deny), would not prove that he had knowledge of the abortion *before* it occurred. A father—finding his daughter in that condition and owing for her medical care, might well contribute toward such a payment without having any previous knowledge of the occurrence; second, because, as we have already said, even if he had knowledge and approved of the abortion—however wrong it might be—it did not tend toward the alienation of Mrs. Schneider's affections. It might possibly have tended to alienate the husband's affections from her, but that could not be the cause of complaint in this action.

We must also eliminate all of the circumstances that depend alone upon the hearsay evidence or statements of plaintiff's wife in the absence of the defendant. This includes the alleged statements of the defendant about disinheriting his daughter, which were not proven by other evidence. It also eliminates the claim, that the defendant's statement to plaintiff "that his wife had gone to town" was false. The only evidence of this falsity was the unsworn statement of plaintiff's wife, which was purely narrative and clearly hearsay and entirely incompetent against the defendant.

For the reasons which we have already stated in this opinion upon another point, the evidence as to the subsequent litigations, must also be disregarded.

The only circumstances left and the only competent facts which can be considered as tending to prove that

the defendant did any act, or said anything, to alienate the affections of his daughter from her husband, is the fact that he was present at plaintiff's home the day before plaintiff's wife left; that there was an arrangement for her to come over to his home, and that he then invited her to bring her little girl along; that about that time he had a conversation with plaintiff's wife in German, and that she did not return to her husband, but remained in the defendant's home. This may be evidence sufficient to raise a suspicion in one's mind, or to suggest a possibility of the defendant's culpability, but it does not seem to us any *proof* that the daughter left upon his persuasion.

There is no evidence whatever that she had informed her father at that time that she was about to leave the defendant permanently. On the contrary, she told the woman who was there and who was a witness for the plaintiff that she would be back in about a week or ten days—in time to take care of some fruit she was about to put up. Her husband testified himself that he knew of the proposed visit to her father and made no objection—indeed, he was perfectly willing she should go and expected her to return in a few days. The fact that defendant invited her to bring the child (his grandchild) was not an unnatural thing, and is just as consistent with the grandfather's natural feeling as it is with any culpable intention.

Neither is the talk in German in the presence of the witness, who was apparently almost a stranger to defendant, of any special significance. What the talk was about does not appear. It may have been in relation to the abortion which his daughter had suffered. At any rate there are many things which a father and daughter do not care to discuss in the presence of a

stranger, and the fact that they go aside to talk by themselves, or talk in a different language, where it happens to be one familiar to them, can hardly be accepted as *proof* of guilty motive or conduct. As we have said before, the most that can fairly be claimed under these circumstances, is that they suggest a suspicion that the defendant *might possibly* have influenced his daughter.

It is urged, however, that this was *some evidence* in the case and, therefore, that the verdict of the jury is conclusive and cannot be disturbed under the constitutional amendment to Article VII of the State Constitution adopted in 1910. Section 3 of that amendment provides:

"No fact tried by a jury shall be otherwise reexamined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

This amendment has been frequently before this court and has been uniformly construed as prohibiting the trial court, or this court, from interfering with the verdict of a jury, where the evidence was conflicting, or where there was no conflict but there was substantial evidence upon which the jury could reasonably find the verdict in question: *Consor* v. *Andrew,* 61 Or. 483 (123 Pac. 46); *Forrest* v. *Portland Ry. L. & P. Co.,* 64 Or. 240 (129 Pac. 1048); *Buchanan* v. *Hicks,* 66 Or. 503 (133 Pac. 780, 134 Pac. 1191); *Saxton* v. *Barber,* 71 Or. 230 (139 Pac. 334); *Martina* v. *Oregon-Wash. R. & N. Co.,* 73 Or. 283 (144 Pac. 104); *Sink* v. *Allen,* 79 Or. 78 (154 Pac. 415).

The court has seldom been called upon to pass upon the question of whether or not, under the constitutional provision, evidence to raise only a suspicion or

conjecture, would prohibit the court from setting aside a verdict.

We think, however, the constitutional provision did not intend to go further than to prohibit the court from reweighing the evidence and revising the verdict of the jury in cases where there was conflicting evidence, or substantial evidence, to sustain the verdict.

In *Martina* v. *Oregon-Wash. R. & N. Co.*, 73 Or. 283 (144 Pac. 104), Mr. Justice RAMSEY, delivering the opinion of the court, said:

"In order that a verdict may be supported by the evidence, there must be some legal evidence tending to prove every material fact in issue."

In *Consor* v. *Andrew*, 61 Or. 483 (123 Pac. 46), there was a proceeding against the administrator of an estate, and under the law it was necessary that the evidence of the plaintiff should be corroborated. The only corroboration was certain letters, and it was claimed that an inference could be drawn from these letters corroborating the evidence of the plaintiff, and therefore, the verdict could not be disturbed. Mr. Justice MOORE, delivering the opinion of the court, said:

"An inference is a species of evidence, but it is believed that the clause of the fundamental law referred to, requires a greater degree of proof than is afforded by such indirect probative matter. In our opinion there was 'no evidence,' within the meaning of that phrase, as used in the amendment of the constitution, adequate to support the verdict, and, this being so, judgment cannot be affirmed on the legal principle invoked."

Previous to the amendment it had been the practice of the courts to reweigh the evidence, which had been presented before a jury, and set aside the verdict if the

court deemed the verdict clearly against the *weight* of the evidence.

In *Serles* v. *Serles*, 35 Or. 289, 293 (57 Pac. 634, 635), the court said:

"In passing upon the sufficiency of the evidence to support the verdict, the trial court is authorized to weigh and consider all the evidence which has been submitted to the jury; and if it is ascertained that the verdict is *against* the *clear weight thereof*, or is one that is manifestly unjust, or that reasonable men would not adopt or return, to set it aside and grant a new trial."

And this opinion had been followed in later cases. This doctrine had been especially applied as to the revision of verdicts assessing damages. The object of the constitutional provision was clearly to prohibit this practice.

In *Buchanan* v. *Hicks*, 66 Or. 503 (133 Pac. 780, 134 Pac. 1191), Mr. Justice MOORE, delivering the opinion of the court, said:

"It has been the practice of many trial courts in Oregon, prior to the amendment of the organic law, parts of which have been quoted, to set aside judgments and grant new trials, when, from a consideration of all the evidence given at the trial of an action, it was believed the verdict was excessive. In order to inhibit such practice and to uphold verdicts, the Constitution was amended so as to preclude a court from re-examining any fact that had been tried by a jury, when the verdict returned was based on any legal evidence."

We do not think the constitutional amendment intended to go any further than this, or to prohibit the court from setting aside a verdict where the evidence was only sufficient to raise a suspicion or conjecture. It must be remembered that under the constitutional

provision it is not "any evidence" which prevents the interference of the court, but any evidence *"to support the verdict."*

This is substantially the conclusion announced by Mr. Justice RAMSEY in *Sullivan* v. *Wakefield,* 65 Or. 528 (133 Pac. 641).

It is obvious that in many cases there may be some evidence, and even evidence which is competent and material and entirely admissible, and yet it may not be sufficient to support a verdict. In criminal cases, evidence of motive, for the commission of a crime, is always competent and admissible, so of course is evidence that *somebody* had committed the crime in question; and yet it would hardly be contended that evidence of motive on the one hand, and that the crime had been committed on the other without more, would support a verdict of guilty. If this were the rule, all that would be necessary to convict any man, where there had been a larceny of money, would be to show that he liked and wanted money and, therefore, had a motive, and most of us could be easily proven to belong to that class.

10. We hold that evidence merely suggesting a suspicion or possibility, does not bring the case within the constitutional amendment, but that there must be substantial evidence upon which a reasonable man *might* reach a reasonable verdict.

There does not seem to be any such evidence in this case, and we must conclude that the verdict was brought about by prejudice, resulting from the incompetent and improper evidence as to the supposed conduct of the defendant in other matters—that he had dealt harshly with the plaintiff in the matter of foreclosing the mortgage and suing upon the note, and

that he had, perhaps, approved of his daughter's abortion—and by their consideration of the incompetent hearsay evidence as to what the daughter is claimed to have said her father told her.

Cases of this kind are altogether different from the ordinary suit for alienation of affections, where an outsider has wantonly interfered with the marriage relation for selfish purposes of his own. The parents of a married daughter are close to her by blood and affection; they are bound to support her by every tie, both legal and ethical; they cannot inquire first whether she is right, in a controversy with her husband, and turn her out and disregard her if she is wrong. Their home is her home, and if they are right thinking people it must continue to be so whatever she does or wherever she goes. Their doors must open to her cheerfully and willingly when she is in trouble, without regard to who is at fault or who has brought it about. To say that, because they have performed this duty and brought their daughter back to their hearthstone when she could no longer get along with her husband, a presumption may be raised against them, or an inference sustained, by which they should be, upon such facts alone, heavily mulcted in damages, would be as unfair and unjust as it would be contrary to good public policy.

Of course, there may be, and no doubt there are, cases where the parents have wickedly interfered, from spiteful and malignant motives, and in such cases they should be held liable for their wrong, but before a verdict against a parent can be sustained, it must be proven by direct or circumstantial evidence, that the parent actually did persuade or induce the alienation complained of.

We think there is no case in existence, in which a verdict against a parent has been sustained, where the competent evidence was so shadowy and conjectural, as in this case.

The case of *Price* v. *Price,* 91 Iowa, 693 (60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150), is probably the strongest case that can be cited to sustain such a verdict, and in that case the evidence was very much stronger than here. In summing up the court said:

"He stated that he [the defendant] thought the plaintiff and George should separate; that it would be better if George were free for in that case he would have a part of the estate, as he did not intend that any of his money should go outside of his family. For several months after their marriage George lived a part of the time with plaintiff and her mother, and a part of the time with defendants. He worked for several different families and persons and contributed some to the support of plaintiff; but he did not remain long with any one employer. *The defendants were active during that time in trying to induce him to leave the plaintiff.* * * For about a month after he left Des Moines the plaintiff did not hear from him or know where he was and when she applied to defendants for information, they professed to be as ignorant as she was in regard to him, although they corresponded with him and knew where he was and what he was doing. * * During the first part of the time they were in Keokuk, George was kind and affectionate to the plaintiff and they lived happy together. He received letters from the defendant during that time and finally received one which the plaintiff did not read. When that was received George told the plaintiff he was going to leave her, as the defendants wished him to."

It must be assumed that all of these facts were proven by competent testimony, and if so, it is plain without further analysis, that the evidence was infinitely stronger than here.

Stanley v. *Stanley*, 27 Wash. 570 (68 Pac. 187), was a suit by the wife against her husband's father and mother. There was testimony tending to show that the mother had been active in causing the separation, but the only evidence that the father had taken part in the matter was that he, as well as his wife, had made statements to the effect that if their son should return to live with respondent, they would disinherit him, and that the father and mother had joined in employing an attorney to procure for their son a divorce from respondent. The court ordered a nonsuit as to the father, saying:

"There is a wide distinction between an action by husband or wife against the parent of either and one against some stranger, who invades the domestic circle and separates husband and wife. * * The most the evidence shows against him is, that he did not desire his son to live with respondent, and employed an attorney to obtain a divorce from her, and said he would disinherit his son if he returned to live with respondent, but it is not shown that this was communicated to the son, or that the son did not request him to employ the attorney for the purpose of procuring the divorce. There is no evidence in the case supporting the allegations against him."

In *Pooley* v. *Dutton*, 165 Iowa, 745, 754 (147 N. W. 154, 157), the court quotes with approval from a previous decision of Chancellor Kent, as follows:

"A father's house is always open to his children; and, whether they be married or unmarried, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum. The father is under even a legal obligation to maintain his children and grandchildren, if he be competent, and they unable to maintain themselves; and, according to Lord Coke, it is 'nature's profession to assist, maintain, and console the child.' I

should require, therefore, more proof to sustain the action against the father than against a stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband, from improper motives."

It is urged on behalf of respondent that there were some general statements on the part of plaintiff in his testimony, which are assumed to have been based on probative facts, and which, therefore, it is urged we should consider as evidence in the case. In one place plaintiff testified:

"Q. Now you said yesterday you got along all right, but somebody else was always butting in.
"A. Yes, sir.
"Q. Who was that somebody else?
"A. Her folks.
"Q. Just say who they were; all her folks?
"A. No, I believe it wasn't all her folks. I know it was them Zumwalts and it was her father.
"Q. Zumwalts and the father?
"A. Yes, sir."

We can hardly consider this as anything more than a general statement of a conclusion of the witness. However, in view of all the circumstances, we think the case should go back for a new trial instead of being arbitrarily dismissed, when, if there are any facts which were not disclosed by the evidence, and to which plaintiff had reference in these general statements, he can have an opportunity, if he desires, to fully present them.

Reversed and remanded for a new trial.

REVERSED AND REMANDED. REHEARING DENIED.

HARRIS, J.—I concur in all that Mr. Justice BENNETT says concerning the incompetency of (1) the statement of Mary Schneider referred to in the second

assignment of error; (2) the statement made by Mary Schneider to the plaintiff before marriage to the effect that her father and mother wanted her "to quit" the plaintiff; (3) the judgment-roll in the action of replevin and the judgment-roll in the action which was brought on the promissory note. I agree also with the conclusion that the judgment should be reversed and the cause remanded for a new trial. I acquiesce, too, in the announcement that a verdict cannot be permitted to stand if the evidence offered in support of it does no more than to raise a suspicion. I am unable, however, to assent to the view that the competent evidence appearing in the record is insufficient to raise more than a suspicion or conjecture.

If the opinions of Mr. Justice BEAN and Mr. Justice BENNETT are taken together it will be found that substantially all the important evidence appearing in the record is found in one or both of those opinions. If we first eliminate the incompetent evidence specified in assignments of error 2, 3, 4 and 5 and again read the two opinions, stripped of such incompetent evidence, there will yet remain, as the writer views it, sufficient evidence to entitle the plaintiff to go to the jury and enough evidence to sustain and support a verdict for the plaintiff. In other words, I think that the competent evidence, when considered as a whole, is sufficient, if the jury believes it, to raise more than a suspicion and that its combined strength is enough to sustain and support a verdict for the plaintiff, and consequently is enough to entitle the plaintiff to have his cause submitted to a jury. The competent evidence must be considered in its entirety. If the contention of the plaintiff is rested upon any one of the several circumstances relied upon by him and without regard

to the remaining circumstances then there would be room to argue that he was not entitled to go to the jury; but the cause of the plaintiff is not to be judged by any single circumstance segregated and isolated from all else in the record. The case presented by the plaintiff must be measured by all the circumstances viewed as a combined whole. The judgment should be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED. REHEARING DENIED.

BENSON and JOHNS, JJ., concur.

BEAN, J., Dissenting.—This is an action by plaintiff Jacob Schneider against defendant George Tapfer for damages for the alienation of the affections of plaintiff's wife Mary Schneider who is the daughter of the defendant.

The gist of the complaint is that plaintiff and Mary Tapfer were married August 1, 1912, and now are husband and wife having two children, the issue of such marriage; that the plaintiff and his wife lived happily together as husband and wife; that during September, 1916, and for a long time prior thereto the defendant wrongfully contriving and intending to injure the plaintiff and to deprive him of the love, comfort, society and assistance of his wife, wrongfully, purposely and maliciously by his conduct and conversation with the wife and by false representations and insinuations so prejudiced and poisoned the mind of the wife against the plaintiff and so alienated her love and affection from the plaintiff that the wife acting on the advice, influence and direction of the defendant did during September, 1916, leave the plaintiff and his home and return to the home of the defendant and has since remained away and refused to return. It is also

alleged that in order to accomplish the above purpose, the defendant induced the plaintiff to purchase the stock and outfit on the Palatine Hill dairy and rent the real estate from the defendant and assume a mortgage held by the defendant and incur other indebtedness to defendant, and that defendant foreclosed the mortgage and took all of the lease and dairy away from the plaintiff.

The answer after admitting the marriage and number of children and denying the remainder of the complaint, affirmatively sets forth that defendant has always acted for plaintiff's welfare; that defendant foreclosed on the dairy to protect his interests and upon the advice of his attorney, all without malice toward the plaintiff, and that—

"Defendant had at all times regarded plaintiff with affection and has at all times attempted to do only such acts as seemed to this defendant to be for the general welfare and benefit and happiness of the plaintiff and his family."

The reply put in issue the new matter of the answer. The cause was tried to the court and a jury and a verdict rendered in favor of plaintiff. Defendant appeals.

BEAN, J.—There are practically two questions presented upon this appeal. Upon the trial the counsel for defendant objected and excepted to the introduction of evidence on the part of plaintiff tending to show statements made by the wife of plaintiff a short time before the separation September 5, 1916, as to the conduct and statements of her father, the defendant, contending that such testimony was merely hearsay. As an example, the plaintiff testified that his wife told him that her father informed her that as long as she

lived with the plaintiff she would receive nothing from her father.

It should be noticed that the issue involved the state of Mary Schneider's mind at and immediately before the time she separated from her husband. This cannot ordinarily be shown by direct proof. It is for the jury to make its inference from the testimony in order to solve a question of fact of this character.

In an action by the husband against his wife's father for the alienation of the wife's affection, declarations of the wife concerning conduct on the part of her parent before the separation, and having reference to her separation from the plaintiff and to inducements held out to the wife to abandon plaintiff are competent for the purpose of showing the mental attitude of the wife, and the cause which promoted the separation, but not as evidence of the truth of the declarations: 13 R. C. L., § 527, p. 1478; 6 Ann. Cas. 664, note; 1 Greenleaf on Ev. (16 ed.), § 162d; 3 Wigmore on Ev., §§ 1729, 1730; *Price* v. *Price*, 91 Iowa, 693, 701 (60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150); 21 Cyc., p. 1624; *White* v. *White*, 140 Wis. 538 (122 N. W. 1051, 133 Am. St. Rep. 1100); *Hardwick* v. *Hardwick*, 130 Iowa, 230 (106 N. W. 639); *Williams* v. *Williams*, 20 Colo. 51 (37 Pac. 614); *Nevins* v. *Nevins*, 68 Kan. 410 (75 Pac. 492); *Horner* v. *Vance*, 93 Wis. 352 (67 N. W. 720); *Hillers* v. *Taylor*, 116 Md. 165 (81 Atl. 286).

In the latter case the court said:

"In that respect the defendant's acts and utterances as recited by the spouse are not hearsay, and are admitted, not as evidence of the truth of the statements, but of the mental state and motives of the party making them without reference to the truth of the statements themselves."

To the same effect see: Ann. Cas. 1912C, note at p. 1182; *Preston* v. *Bowers,* 13 Ohio St. 1 (82 Am. Dec. 430); *Saxton* v. *Barber,* 71 Or. 230 (139 Pac. 334). There was no error in admitting the evidence complained of for the purpose of showing the state of mind of Mary Schneider, the wife of plaintiff.

At the proper time counsel for the defendant interposed a motion for a nonsuit and assigns error in the refusal to grant the same, and now contends that the verdict is not supported by any competent evidence. The liability of defendant must be shown by testimony independent of the statements of the wife as to what her father had said and done.

It appears from the record that plaintiff Jacob Schneider was born in Switzerland and came to the United States in 1910, and to Oregon in 1911. He was then nineteen years of age and was engaged to work on the dairy of the defendant Tapfer, on Palatine Hill, and thus became acquainted with Mary Tapfer, defendant's daughter, who was then a year younger. After he was there about five months they fell in love and became indiscreet. Shortly after defendant took another dairy near Vancouver and the plaintiff went there in his employ. Plaintiff on account of a slight dispute quit work in July, 1912, and went back to the old place on Palatine Hill. He received a letter from Mary a few days later and also met her. On August 1, 1912, they were married without the knowledge of her parents. They went to Denver where plaintiff worked on a dairy for five months. They then went to Washington where plaintiff worked on a country-place near Bremerton for three months. About April, 1913, they came to Portland having about $800. Plaintiff worked on a dairy near Scappoose, she did housework in Portland. A little later she saw her parents, and

plaintiff with his wife and baby went to her parents' home near Vancouver where plaintiff worked until September, 1914, when the plaintiff rented a dairy near Holbrook, purchasing the stock. His wife remained with her parents for the first month until the second child, Arnold, was born. The plaintiff was industrious and frugal. He sold the Holbrook dairy realizing $1,400 cash. After consultation with the defendant, he, together with his partner Zumwalt, purchased the Palatine Hill dairy stock and fixtures for $5,000, paying the $1,400 cash, and with Zumwalt gave a mortgage to Tapfer for $1,953.05, and assumed a small note. Mr. and Mrs. Schneider purchased Zumwalt's interest in May, 1916. Mrs. Schneider abandoned plaintiff September 5, 1916. About October 25, 1916, she commenced an unsuccessful suit for a divorce. On October 17, 1916, Tapfer foreclosed the mortgage for $1,953.05 and brought action on the note against plaintiff for a balance of $646 and ousted the plaintiff from the premises.

In regard to the relations existing between the plaintiff and his wife before and at the time of the separation, and as to the conduct of the defendant, part of the testimony was as follows: Theodore Villiger, witness for plaintiff, testified in substance that he had run the Palatine Hill dairy and sold the same to plaintiff and his partner Zumwalt for $5,000. That at one time defendant said plaintiff Schneider was a fool and a greenhorn, and that kind of stuff, and was no business man; that he could see that defendant did not like plaintiff. Mrs. Lillian Reiser, witness for plaintiff, testified to the effect that she and her husband went to work at the Palatine Hill dairy August 25, 1916; that they lived in the house with plaintiff and his wife who lived as happily as any married people

could; that she was loving to him, kissing him, spoke well of him, and never complained; that Mr. Tapfer, the defendant, was there at the home of plaintiff on September 4, 1916, the day before his wife left to go home; that Mrs. Schneider expected to visit her parents and had made arrangements to leave the little girl with the witness; that Mr. Tapfer told his daughter she had better bring both children with her; that Mrs. Schneider said she would be back in a week or ten days; that she never came back; that plaintiff sent the witness to the father's home in Washington to try to beg her to come back, "and that evening I tried to beg her to come back home, and she consented that I could take the little girl, and the next morning she backed out and said I could not take her." She was then living in her father's house; that the witness told Mr. Tapfer she tried to coax her to come back, and let them take care of their children as a father and mother ought to do, and that he did not say anything one way or the other; that on the fourth day of September, when Mr. Tapfer came to plaintiff's home, he was there during dinnertime and that Mrs. Schneider was sick and her father "asked her how she was getting along, and she said she wasn't any better. He asked her if she had finished paying the doctor's bill. She had went and had an abortion performed, and she said 'No,' and he laid down a twenty-dollar gold piece on the kitchen table for her to go and finish paying the doctor bill." That the next morning after Mrs. Schneider left home, Mr. Tapfer called the witness over the telephone twice and asked her if Mary had started, she was supposed to meet her father and go home with him; that he was impatient to know whether or not Mary was coming.

In answer to the question, "What did you tell him on the second call?

"A. I told him she said—he said for her to come up to your office, Von Hoomissen's office, and I told him that was where she was going.

"Q. How did you know she was coming up to my office?

"A. That is what she told me to tell him if she missed him. She would meet her father at your office."

She left that morning with the two children.

Emil Reiser, husband of the former witness, testified that plaintiff and his wife got along well together; that they were very loving and affectionate.

Anne O'Keefe, witness for plaintiff, testified to the purport that she lived on Palatine Hill about a quarter of a mile from plaintiff and his family, and that she and the Schneiders frequently visited; that as far as she could see Schneider and his wife got along as nice as any married couple, they were jolly, friendly and affectionate, they always had lots of fun together in the evening. This witness stated that she had a talk with Mrs. Schneider when she was very sick; and that she said "that she had had an abortion performed; that he [Schneider] did not want me to have it done." I said, "I would never tell anybody about that," and she said, "I never told anybody but papa and you, Mrs. O'Keefe."

Plaintiff, Jacob Schneider testified in his own behalf in substance that he and Mary Tapfer, the daughter of the defendant, were married August 1, 1912; that before they were married he worked for the defendant on the Palatine Hill dairy and afterwards near Vancouver, commencing 1911; that he quit work about the last part of July, 1912, went back to the old place on

Palatine Hill and worked for a Mr. Naegly for about two weeks; that Mary wrote to him that her father wanted him to quit and give her up; that they were married without the knowledge of her parents, and they went to Denver, Colorado, where they remained about five months, and then they went to a place near Seattle where they worked about three months, on a farm. That about the 12th of August, 1916, Mrs. Schneider told him as follows:

"She said she told her papa about it, that she was in the family way, and he told her to go to the doctor to have an operation performed. I told her on the phone I would not do such a thing. That as long as God give me two children he could give us another one and I was willing to raise the child."

That after his wife left him September 5th, he went to see her three times. The first time about the middle of September. About that time Mr. Von Hoomissen told him, "Well, Jake, your wife was here and she told me she won't go back to you." I said, "What is wrong?" And he said, "She said she don't want any more children." That about ten or twelve days after his wife left him, after writing two letters, he went to Mr. Tapfer's and asked to see Mary, and asked where she was; that her father told him she was in the City of Portland; that his wife afterwards told him she was cooking for a straw-baling crew about a mile and a half from her father's place; that when he worked for the defendant "he was cross and rough against me"; that defendant called him an "ignorant fool" and "crazy," he even called me "a s——of-a-b——"; that when the children cried defendant said they "were just like the old man"; that his wife told him that her father told her a few times that "as long as she lives with me she wouldn't get nothing. She

wouldn't get nothing from him." That he had only seen his wife to speak to her in the lawyer's office once since she left him; that he begged her to come back and that he begged her father to give her back; that there was no dispute or trouble when his wife left him. The plaintiff further testified that the defendant told him to his face that he was a fool; that he was a green, ignorant foreigner; "that I was no man for Mary." Mrs. Mary Schneider, as a witness for the defendant, in answer to the question, "Why did you leave him [plaintiff] the last time?"

"A. Because he had gotten me into the family way, and I had an abortion performed, and he had called me a murderess and treated me without any consideration whatever, and he demanded me to work just as hard after that operation as when I was in perfect health, and I was so worn down and run down and sick that I couldn't stand it to live with him any longer, and that was the reason I left. I thought if I stayed with him any longer my years were numbered."

There was direct evidence tending to show that the defendant stated to plaintiff that he was a fool and an ignorant foreigner; "that he was no man for Mary"; and that the defendant was instrumental in influencing Mary Schneider to leave plaintiff's home when he told her on September 4, 1916, the day before she left that "you better come out with me and take the children along"; that the defendant had furnished his daughter with money when the husband had refused to supply her with funds for the purpose desired, and the further fact that he inquired of Mary whether she had finished paying the doctor and let her have $20 for that purpose; that before Mary left, defendant had a conversation with her in the German language which the witness Mrs. Reiser, who was present, could not under-

stand, and that when Mrs. Reiser at plaintiff's request went to defendant's home after the separation to induce the wife to return to her husband's house, and she consented to let Mrs. Reiser take the little girl with her upon her return, that when Mrs. Reiser was talking to the defendant and Mrs. Schneider both in regard to the matter, the defendant said nothing and did not attempt to induce the wife to return to her home; that on the following morning the wife changed her mind and refused to let the child return with Mrs. Reiser, and further that when plaintiff visited the defendant's home to beg his wife to return the defendant told plaintiff his wife was in Portland, when she was only a short distance away cooking for strawbalers; that the wife left her husband on September 5, 1916, and never returned; that when she left she went direct to the office of an attorney who had done her father's business for about two years before that time, and consulted him in regard to obtaining a divorce; that defendant telephoned to Mrs. Reiser about meeting his daughter at the law office.

From the statement of defendant to the wife at the time of the money transaction on September 4, 1916, and the other circumstances in evidence, the jury might fairly believe that the defendant knew about the criminal operation and that defendant aided and encouraged Mrs. Schneider in having the same performed against the will of her husband; that defendant maliciously influenced his daughter to leave her husband and remain away from her home; that when she left it was understood between her and her father that she was not going to her father's home for a visit only, but to remain.

It is the claim of defendant's counsel that the witness Lillian Reiser "squarely perjured herself in relation to this transaction, and having heard of the passing of the $20 declared she saw it given." This is certainly a very material incident as testified to by Mrs. Reiser, but the truth or falsity of her statement is a question solely for the jury to determine. It is contended on behalf of defendant that the testimony in regard to the defendant letting Mrs. Schneider have money for a certain purpose had no relation to the condition of the mind of the wife, and was incompetent, but the jury evidently came to a different conclusion in regard to the matter. This was the situation: Mrs. Schneider had solicited the consent of her husband to have the operation performed and funds to pay for the same, and had been refused. She then states that she went to her father and told him her trouble and received his approval and the money to pay the expense. Could the jury not believe from this that it would tend to lower the plaintiff in the estimation of his wife in failing to do for her what her father was willing to do? In her mind this was an important matter and according to her version as a witness related to the cause of her leaving the plaintiff.

Malice need not consist of open and affirmative declarations, but may be indicated by conduct and acts and in determining whether the defendant acted maliciously it is necessary to consider the circumstances, situation and relationship existing between the parties: *Leavell* v. *Leavell*, 122 Mo. App. 654 (99 S. W. 460). Some of the evidence is circumstantial and a large part of the testimony is contradicted by defendant. Nevertheless, it cannot by any process of reasoning be said that there was no competent evidence

to support the verdict. In considering the testimony in this case, we should not lose sight of the fact that according to the result of the divorce proceeding the plaintiff Jacob Schneider was not at fault. From that result it does not appear that there was any necessity for the defendant Tapfer to interfere and care for his daughter. The weight of the evidence and the credibility of the witnesses are solely for the consideration of the jury. There were no exceptions saved to the charge of the court to the jury. Much of the testimony was detailed by the witnesses without objection, both sides giving their version of all the main facts and circumstances of the case. In *Price* v. *Price,* 91 Iowa, 693 (60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150), an action by the wife against the parents of the husband for alienation of the husband's affection, it was held that evidence that the defendants had threatened the husband with disinheritance if he continued to live with plaintiff; that while living happily with plaintiff he received letters from defendants which he refused to show plaintiff and immediately thereafter left, was competent to sustain a verdict for plaintiff. In the present case the threat that plaintiff's wife would receive nothing from defendant as long as she lived with plaintiff is practically identical with that in the Iowa case. The conversation defendant had with his daughter in German just before she left the plaintiff corresponds with the suppressed letter in the case mentioned. It was for the jury to draw their own inference from these facts and circumstances taken in connection with the other testimony in the case.

In passing upon a motion for nonsuit on review, the appellate court will give the plaintiff the benefit of all

the legitimate inferences that may fairly be drawn from the evidence. An assignment of error in denying such motion will be sustained only when there is no legitimate room for a difference of opinion as to the effect of the evidence, and when the court can say that there is no evidence tending to support the verdict in some essential particular; this although the testimony of plaintiff is contradicted by that of the defendant: Article VII, Section 3, Constitution of Oregon; *Crowder* v. *Yovovich,* 84 Or. 41 (164 Pac. 576); *Sink* v. *Allen,* 79 Or. 78 (154 Pac. 415); *Johnson* v. *Portland Ry., L. & P. Co.,* 79 Or. 403 (155 Pac. 375).

The reciprocal obligations of parent and child endure through life, and the duty of discharging these divinely instilled obligations cannot be abrogated by the child's marriage. The parent may in good faith counsel and advise his daughter who has contracted an unhappy marriage, and may care for her in the parental home even against the expressed wish of the unfaithful husband: *Tucker* v. *Tucker,* 74 Miss. 93, 98 (19 South. 955, 32 L. R. A. 623). Hence in an action against the father of plaintiff's wife for the alienation of the latter's affection, it is incumbent upon the plaintiff to show that the defendant was actuated by malice. In such a case the father under the cloak of parental kindness toward his daughter has no license to transcend both divine and human laws and counsel, encourage or aid the wife in the advancement of a petty whim or desire to have a criminal operation performed.

Taking into consideration all of the acts and conduct of the defendant, his demeanor toward plaintiff, his statements to plaintiff, and his action soon after the wife left plaintiff, in harshly foreclosing the mortgage on the dairy property when plaintiff had succeeded in

reducing his indebtedness during the short time that he run the dairy under somewhat adverse circumstances, and attaching plaintiff's property, and ousting the plaintiff from the dairy farm, it was for the jury to say whether the defendant evinced malice toward plaintiff. There was evidence tending to show such malice. A careful reading of all of the testimony, some of which has been referred to, leads us to conclude that there was no error in overruling the motion for a nonsuit.

Another assignment of error is directed to a conversation between plaintiff and Mary Tapfer immediately prior to their marriage, in which she told the plaintiff that her father and mother "wanted her to quit altogether." It was plaintiff's contention that because of the runaway marriage and other circumstances pertaining to their union, defendant cherished a feeling of hostility toward him. This conversation threw a mere sidelight on the conditions existing at the time of the marriage. The defendant went into the same subject in his testimony. This testimony was of the same nature as that heretofore discussed. There was no reversible error in admitting the same.

The cause was fairly submitted to the jury. The judgment of the lower court should be affirmed.

Argued March 7, reversed and remanded April 1, rehearing denied June 17, 1919.

ASKAY *v.* MALONEY.

(179 Pac. 899.)

Municipal Corporations—Detectives—Complaint Against Surety—Statement of Necessity for Undertaking.

1. Complaint against city detectives and their surety for death of a third person from an accidental shooting as the detectives were recapturing an escaped prisoner must properly plead the legal necessity for the surety's undertaking described.

Pleading — Conclusion of Law — Complaint Against Surety — Legal Necessity for Undertaking.

2. Complaint against police detectives and surety for death from accidental shooting of third person as detectives were recapturing escaped prisoner, which alleged that on a given date, "in accordance with the law covering such cases," the surety entered into a bond or undertaking, merely pleaded a conclusion of law as to legal necessity for undertaking, and was insufficient; Section 90, L. O. L., providing that reference to ordinance or enactment by its title and date of approval shall be sufficient, not having been complied with.

Evidence—Judicial Notice—Municipal Charter.

3. Under Laws of 1917, page 514, Supreme Court must take judicial notice that on December 25, 1914, the City of Portland was working under the charter which went into effect July 1, 1913, as revised by the council of the city, August 19, 1914; the charter having been filed as required.

Officers—Requirement of Bond—Signature.

4. Though the requirement that an official "give a bond" does not necessarily mean that he must sign it, or that his signature is essential to its validity, unless he does sign it he is not directly liable upon it as a matter of contract.

Officers—Official Undertaking—Liability With Surety.

5. An officer, on the official undertaking or bond executed by him, may be sued jointly with his surety for damages resulting from misconduct in office, if the stipulations of the instrument cover the situation involved.

Municipal Corporations—Detectives—Sureties—Collateral Responsibility—"Reimburse."

6. Where undertaking of surety company was to "reimburse" a city for any loss sustained by reason of failure faithfully to discharge their duties of city detectives named in attached schedule, responsibility of surety was not concurrent, but collateral and successive, while that of detectives was primary; "reimburse" meaning to replace as equivalent for what has been taken, lost or expended, to refund, pay back or restore, indicating a secondary liability.

Appeal and Error—Law of Case—Ruling on Former Appeal—Limitation.

7. Ruling on former appeal that demurrer to complaint on particular ground was not well taken is the law of the case, but its effect must be limited strictly to its extent.

Pleading—Election Between Tort and Contract—Right of Defendant.

8. City detectives and surety for them, sued for accidental shooting of third person by detectives while retaking escaped prisoner, had right to compel plaintiff to elect between two causes of action, one for tort, other on contract, stated in complaint, only liability of detectives as disclosed being for tort, while breach of contract alone could be attributed to surety.

Trial—Ruling as to Duty to Produce Evidence—Statement as to Shifting of Burden.

9. Court cannot tell jury that party holding affirmative of an issue has sustained burden of proof at any stage of the case, and that it then shifts.

Trial—Instructions—Interference With Province of Jury.

10. In view of Sections 726, 810, 868, L. O. L., instructions as to shifting of burden of proof *held* erroneous as interfering with jury's province to act as exclusive judges of effect and value of evidence.

Arrest—Arrest Without Warrant—Right of Officers—Suspicion.

11. Under Section 1763, L. O. L., city detectives *held* within their rights and duties when they arrested without a warrant in a saloon a person suspected of robbery who had in his possession the stolen watch.

Municipal Corporations—Detectives—Escape of Prisoner—Right to Shoot.

12. Under Sections 1760, 1909, L. O. L., city detectives, who had properly arrested without warrant one who had stolen a watch, were in the proper performance of their duty when they shot at the thief on his escape to prevent his getting away.

Municipal Corporations—Detectives—Action in Bond—Pleading.

13. Complaint against city detectives and their surety that the detectives "carelessly and negligently, and without care or caution, disregarding the fact that said street intersection was a place where passengers and people were likely to be," shot at a thief to prevent his escape, properly charged negligence; the adverbs being a proper component of the allegation.

Municipal Corporations — City Detectives — Negligence — Action on Bond—Burden of Proof.

14. On complaint against city detectives and their surety for having carelessly and negligently, disregarding character of street intersection as place where people were likely to be, shot plaintiff's decedent in attempt to recapture escaped thief, it was incumbent on plaintiff to prove occurrence of mishap, and alleged negligence of detectives which brought it about.

Municipal Corporations—City Detectives—Duty of Care in Retaking Thief.

15. City detectives, in retaking in the street a thief who had escaped from their custody, were under duty to act with reasonable prudence to avoid injury to innocent persons, and should have used more caution in firing upon the thief with pistols than if merely grappling with him.

Municipal Corporations—City Detectives—Negligence in Retaking Thief—Question for Jury.

16. Whether city detectives under all circumstances were negligent in shooting in street at thief escaped from their custody, thus accidentally killing plaintiff's decedent, *held* a question for the jury, in action against such detectives and their surety.

From Multnomah: GEORGE G. BINGHAM, Judge.

Department 1.

This is the second appeal of this case. The former opinion may be read in 85 Or. 333 (166 Pac. 29). The defendant Southwestern Surety Company had relied solely on its general demurrer to the complaint but when the case was reversed it filed an answer challenging certain allegations of the complaint, admitting giving two several bonds, one for each of the individual defendants, and setting up substantially that the detective defendants had arrested one John Jones, who had committed a felony; that he escaped and in their effort to recapture him it became necessary to shoot at him, in doing which with due circumspection the defendant Swennes fired and by chance a bullet from his revolver struck the hard-surface pavement or some other intervening object, whereby it was deflected from its true line of aim and struck the plaintiff's decedent, without fault or negligence on the part of Swennes. Referring to the very full statement in the former report of this case for particulars, it is enough to say that the salient facts are that the two detectives, defendants here, had arrested one Jones for robbery, finding on him some of the property taken from the

victim he had robbed, and while they were taking the prisoner to the city jail he broke away and was escaping on Pine Street in Portland. After hot pursuit and commanding him to halt, the detectives fired at him as he continued to run. At the same time a street-car in which the decedent Askay was riding was passing along Fifth Street, crossing its intersection with Pine Street, and a bullet entered the street-car window and killed Askay.

The bond given recites that the ordinance of the City of Portland require each member of the police force thereof to give a bond; that the Southwestern Surety Company has by bids made to the city signified its willingness to issue bonds, and that certain employees have been duly appointed members of the police force, and then undertakes to reimburse the City of Portland or any person, "for any loss sustained by reason of the failure of any persons named in the schedule hereto attached, or additions thereto, as hereinafter provided, * * to faithfully discharge all the duties of their respective offices according to the true intent and meaning of said ordinances, and failure to make payment for any and all damages, that may be adjudged against them by any tribunal for the illegal arrest, imprisonment or injury by him to any person," for the year ending February 2, 1915. The individual detectives did not sign this undertaking and its terms do not indicate that it was intended they should subscribe it. It was executed by the insurance company alone, while the names of the individual defendants are said to be recited in the schedule attached to the instrument.

We remember that the complaint narrates the appointment of the detectives as police officers, the corporate existence of the insurance company and also of

the city, describes the situation at the intersection of Fifth and Pine Streets and declares that on December 25, 1914, while the plaintiff's decedent was a passenger on the street-car at that point, the policemen "commenced to discharge and did discharge revolvers, and thereby caused leaden bullets to be promiscuously sent towards the street-car upon which plaintiff's intestate was then riding, and the said defendants, Patrick R. Maloney and Tom Swennes, at said time, each holding and discharging revolvers, carelessly and negligently, and without care or caution, disregarding the fact that said intersection was a place where passengers and people were likely to be, discharged said revolvers and caused one of said leaden bullets to strike plaintiff's intestate," whereby he was killed. It is further charged that the officers mentioned carried revolvers by virtue of their official capacity and pretended to be in discharge of their regular duties at the time in that they, "although without justification, were discharging their said revolvers towards a person whom, as said police officers, they and each of them had arrested and taken into custody."

The defendants, challenging the complaint in material particulars, urge as a justification that the party arrested had committed the felony of robbery, for which they had taken him into custody; that he escaped while they were conducting him to the city jail and after pursuing him and commanding him to halt they fired at him, using due care and caution, and the killing of Askay was the result of unavoidable accident. This matter was traversed by the reply. From a verdict and judgment in favor of the plaintiff the defendants have appealed.

REVERSED AND REMANDED.

For appellants there was a brief over the names of *Mr. Henry J. Bigger, Mr. Stanley Myers* and *Mr. Chester V. Dolph,* with an oral argument by *Mr. Bigger.*

For respondent there was a brief over the names of *Messrs. Richards & Richards* and *Mr. Coy Burnett,* with oral arguments by *Mr. Oren R. Richards* and *Mr. Burnett.*

BURNETT, J.—1, 2. In passing, it is proper to note that as stated in 29 Cyc. 1451,

"The purpose of an official bond being to protect the government from loss due to the improper performance of an official duty, as well as to insure the proper performance of such official duty, a bond purporting to be an official bond, given when not required by the law, has no legal effect."

This is well supported by authority. It is laid down in *Malheur County* v. *Carter,* 52 Or. 616 (98 Pac. 489), that the complaint itself must show the authority for taking an official bond and that the recitals of the instrument itself are not sufficient for that purpose. It would seem to be necessary, therefore, that the complaint should properly plead the legal necessity for the undertaking described in the complaint. The allegation of that pleading in the instant case is, "that on the twenty-eighth day of February, 1914, in accordance with the law covering such cases, the Southwestern Surety Company entered into a bond or undertaking," a copy being attached as an exhibit. To state that this instrument was executed "in accordance with the law covering such cases," is but to state a conclusion of law, and is not the averment of a fact. Under Section 90, L. O. L., it is sufficient to refer to the ordinance or enactment of any incorporated city

or town by its title and the date of its approval in stating a right derived therefrom; but it is essential that this section should be complied with if the plaintiff would show the validity of the undertaking upon which he relies.

3–5. The occurrence narrated in the complaint took place, as stated therein, December 25, 1914. At that time the City of Portland was working under the charter which went into effect July 1, 1913, as revised by the council of the municipality August 19, 1914. Of this we must take judicial notice: Chap. 273, p. 514, Laws 1917; *Crowe* v. *Albee*, 87 Or. 148 (169 Pac. 785). That charter contains no direct reference to the duty of a police officer to file an undertaking. While, as taught in *Clark* v. *Bank of Hennessy*, 14 Okl. 572 (79 Pac. 217, 2 Ann. Cas. 219), "giving a bond" by an official does not necessarily mean that he must sign it or that his signature is essential to its validity, unless he does sign it he is not directly liable upon it as a matter of contract. We are not unmindful, indeed, that under Section 349, L. O. L., when a public officer by official misconduct forfeits his official undertaking or other surety or renders his sureties therein liable thereon, any person injured by such misconduct, or the one entitled to the benefit of such surety, may maintain an action thereon in his own name against the officer and his sureties. This can mean nothing more than that upon an instrument executed by the officer he may be sued jointly with his sureties for damages resulting from his misconduct in office, if the stipulations of the instrument cover the situation involved.

6. A perusal of the undertaking here in question shows no more than that the surety company collaterally undertook to indemnify the city or anyone injured by the malfeasance of the individual defendants. The

deduction is that the latter are not directly liable as upon contract. It is not intimated in the pleadings that they gave a bond. According to the complaint, if culpable at all, they committed a tort and not a breach of the contract; while on the other hand the surety company, if liable at all, is chargeable only upon contract and not for tort. The responsibility of the company is not concurrent, but collateral and successive, while that of the individual defendants is primary. The undertaking of the company was to "reimburse," which means to replace as an equivalent for what has been taken, lost or expended, to refund, pay back, restore: 7 Words & Phrases, 6051, indicating clearly a secondary liability.

7, 8. It is the law of the case because so laid down in the former decision herein, that the demurrer on this ground was not well taken. The effect of that ruling, however, must be limited strictly to that extent. What is said here leads to the conclusion that the Circuit Court was in error in not compelling the plaintiff to elect between the two causes of action stated in the complaint, the one for tort and the other on contract. It was a right of the defendants that an election should be compelled: *Hayden* v. *Pearce,* 33 Or. 91 (52 Pac. 1049); *High* v. *Southern Pac. Co.,* 49 Or. 98 (88 Pac. 961); *Harvey* v. *Southern Pac. Co.,* 46 Or. 505 (80 Pac. 1061); *Swank* v. *Moisan,* 85 Or. 662 (166 Pac. 962). The canon laid down by the case last cited is in substance that to require an election it must be impossible for both causes of action simultaneously to be true. The plaintiff's averment is that the company, not the other defendants, entered into a bond "to indemnify and pay any damages which any person might suffer by reason of neglect or injury caused by said Patrick Maloney or said Tom Swen-

nes." Here, as the plaintiff's grievance is stated in the complaint, it is impossible for a liability on the bond to become a fact until the damages for the tort have been adjudicated in the terms of the undertaking. The police officers had not executed any bond. For all that appears in the complaint they may have been utterly ignorant of its existence. Their only liability, as disclosed by the plaintiff's pleading, is for tort, and breach of the contract is all that can be attributed to the company. The court was in error in not requiring an election.

9, 10. The defendants complain that the court was wrong in giving to the jury the seventh and eighth instructions, as follows:

"(7) But when the testimony shows that weapons, pistols, in the hands of Mr. Maloney and Mr. Swennes, killed a man when they had control of these weapons, it then devolves upon Mr. Swennes and Mr. Maloney to show that the killing was unintentional, and without negligence or fault upon their part.

"(8) When the plaintiff has shown the death of his intestate by a bullet that came from the pistols of those officers the burden is then shifted to the defendants to show that it was unintentional and without fault, negligence or carelessness upon their part."

The rule is thus stated:

"The term 'burden of proof' has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a *quantum* of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a *prima facie* case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of

evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end": 10 R. C. L. 897; *Mobley* v. *Lyon*, 134 Ga. 125 (67 S. E. 668, 137 Am. St. Rep. 213, 19 Ann. Cas. 1004); *Supreme Tent K. M.* v. *Stensland*, 206 Ill. 124 (68 N. E. 1098, 99 Am. St. Rep. 137); *Shephard* v. *Western Union T. Co.*, 143 N. C. 244 (55 S. E. 704, 118 Am. St. Rep. 796); *Boardman* v. *Lorentzen*, 155 Wis. 566 (145 N. W. 750, 52 L. R. A. (N. S.) 476); *Tourtellot* v. *Rosebrook*, 11 Met. (Mass.) 460.

In connection with the duty of producing evidence which may devolve upon one or the other party by turns during the progress of the trial, the court in deciding a motion for nonsuit or for a directed verdict has authority to rule that the one or the other party has or has not made a sufficient case to require his opponent to proceed, but it does not give to the judge the right or duty to say to the jury that the party holding the affirmative of the issue has sustained the burden of proof at any stage of the case and that it then shifts to the other party. Our statute declares that—

"The party having the affirmative of the issue shall produce the evidence to prove it. Therefore, the burden of proof lies on the party who would be defeated if no evidence were given on the other side": Section 810, L. O. L.

And it is said in Section 726, L. O. L.: "Each party shall prove his own affirmative allegations." Again, the jury is the judge of the effect or value of the evidence addressed to it, except when it is declared to be conclusive: Section 868, L. O. L. The deduction is that when the court instructs the jury that the burden of proof shifts, it is interfering with the province of the jury in its capacity to act as the exclusive judge

of the effect and value of the evidence. The giving of those two instructions was therefore erroneous.

11, 12. The theory of the trial court seems to have been that it was sufficient to show that the death of plaintiff's decedent happened from a pistol shot fired by one of the policemen. That these men were peace officers and authorized to make arrests is shown by *Reising* v. *City of Portland,* 57 Or. 295 (111 Pac. 377, Ann. Cas. 1912D, 895, 8 N. C. C. A. 800). A peace officer may arrest a person without a warrant when a felony has in fact been committed and he has reasonable cause to believe the person arrested to have committed it: Section 1763, L. O. L. The practically admitted facts are that early in the evening of the day in question a man had been robbed of his watch and some money in the northern part of Portland; he appealed to the chief of police and the two officers defendant here were detailed to accompany him to search for the robber. They found him in a saloon near the scene of the robbery and in his possession the watch of which the man had been robbed. The officers were clearly within their rights and duties when they arrested him without a warrant. It is said in Section 1760, L. O. L.:

"If after notice of intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary and proper means to effect the arrest."

Section 1909, L. O. L., declares that:

"The killing of a human being is also justifiable when committed by any person as follows:— * * In the attempt, by lawful ways and means, to arrest a person who has committed a felony, * * "

—while the preceding section justifies public officers in killing one when necessarily committed in retaking

persons charged with or convicted of crime, who have escaped or been rescued, or in arresting a person fleeing from justice, who has committed a felony.

13, 14. The officers were plainly in the performance of their duty enjoined upon them by law, but it is charged that in so doing they acted "carelessly and negligently and without care or caution, disregarding the fact that said intersection was a place where passengers and people were likely to be." The adverbs "carelessly" and "negligently" and the phrase "without care or caution" are not sufficient of themselves alone to impute culpability to a lawful act; but in conjunction with the averment that the officers disregarded the fact that the intersection was a place where passengers and people were likely to be, they are a proper component of an allegation upon which to base a charge of negligence. It is not sufficient, however, even under such a complaint, to show the mere happening of an accident. The complaint in this respect consists of two elements: One, the occurrence of the mishap; and the other, the alleged negligence of the defendants which brought it about. Under the issues of this case, it was incumbent upon the plaintiff to prove both of these elements. The burden of proof rested upon him until the final analysis of the evidence after all of it had been put into the scales on both sides, and he was entitled to prevail only if the jury in weighing the testimony as it was submitted to it, should determine that the balance preponderated in his favor. In *Duntley* v. *Inman*, 42 Or. 334 (70 Pac. 529, 59 L. R. A. 785), a pulley broke in the mill of the defendant company and killed the plaintiff's decedent, an employee there. After citing sundry precedents, Mr. Justice BEAN goes on to say:

"There was, therefore, no error in instructing the jury that the plaintiff must prove the negligence alleged, or in refusing to instruct that the breaking of the pulley, if unexplained by the defendant, was of itself evidence of the want of care on its part."

To the same effect is *Finn* v. *Oregon Water P. & Ry. Co.*, 51 Or. 66 (93 Pac. 690). The rule is thus laid down in *McComber* v. *Nichols*, 34 Mich. 212 (22 Am. Rep. 522):

"Injury alone will never support an action on the case; there must be a concurrence of injury and wrong. If a man does an act that is not unlawful in itself he cannot be held responsible for any resulting injury, unless he does it at a time or in a manner or under circumstances which render him chargeable with a want of proper regard for the rights of others. In such a case the negligence imputable to him constitutes the wrong, and he is accountable to persons injured, not because damage has resulted from his doing the act, but because its being done negligently or without due care has resulted in injury. If the act was not wrongful in itself, the wrong must necessarily be sought for in the time or manner or circumstances under which it was performed, and injury does not prove the wrong, but only makes out the case for redress after the wrong is established."

It is succinctly stated thus in *Radcliffe* v. *Mayor*, 4 N. Y. 200 (53 Am. Dec. 357), quoted with approval in *Pickens* v. *Coal River B. & T. Co.*, 51 W. Va. 445 (41 S. E. 400, 90 Am. St. Rep. 819):

"An act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow."

And it is said in *Highway Commissioners* v. *Ely*, 54 Mich. 173 (19 N. W. 940), by Mr. Justice CHAMPLIN:

"There is no liability for doing an act which is either directed or authorized by a valid statute, if performed with reasonable care and skill."

15, 16. A street is not a sanctuary for a robber, and the officers had a right to exercise their prerogative of arresting the felon wherever they might find him, whether in the street or in some secluded spot. The mere act of their shooting at him was not unlawful or negligent *per se,* because as to the arresting officers it was authorized by statute. Of course, it was their duty to act with reasonable prudence to avoid the injury of innocent persons, and the care must be commensurate with the danger involved. It goes without saying that a greater *quantum* of caution should be observed in firing upon him with pistols than if they were grappling him with their hands. Whether they were negligent under all the circumstances of the case, as a result of which the injury was inflicted, was a question for the jury to determine according to the preponderance of the evidence upon a consideration of the whole case: *Palmer* v. *Portland Ry., L. & P. Co.,* 56 Or. 262 (108 Pac. 211); 59 Am. & Eng. R. Cas. (N. S.) 68. See, also, *Morris* v. *Platt,* 32 Conn. 75; *Paxton* v. *Boyer,* 67 Ill. 132 (16 Am. Rep. 615); *Shaw* v. *Lord,* 41 Okl. 347 (137 Pac. 885, Ann. Cas. 1916C, 1147, 50 L. R. A. (N. S.) 1069); *Brown* v. *Kendall,* 6 Cush. (Mass.) 292; cited in the former opinion.

In the main, the cases cited by the plaintiff are those where the shooting occurred under circumstances making it negligent *per se* to discharge the weapons. For instance, *Morgan* v. *Mulhall,* 214 Mo. 451 (114 S. W. 4), was a case where the shooting was by private parties in a promiscuous fracas at a "Wild West" show. *Manning* v. *Jones,* 95 Ark. 359 (129 S. W. 791), concerned private parties hunting on leased land where they shot the tenant, as they said, "accidentally." The court said:

"The test of liability is, not whether the injury was accidentally inflicted, but whether the defendants were free from blame."

And in *Benson* v. *Ross*, 143 Mich. 452 (114 Am. St. Rep. 675, 106 N. W. 1120), private parties were shooting at a mark within the city limits in violation of an ordinance forbidding the same. A similar case was *Conradt* v. *Clauve*, 93 Ind. 476 (47 Am. Rep. 388), where a horse was killed by parties engaged in target practice in the fair grounds of the defendants by their permission. *Bizzell* v. *Booker*, 16 Ark. 308, cited by the plaintiff, was a case where it was alleged that the plaintiff's cotton was burned by a forest fire charged to have been started by the defendants' camp fire. One section of the syllabus reads thus:

"Where one is doing a lawful act—or an act not mischievous, rash, reckless, or foolish, and naturally liable to result in injury to others—he is not responsible for damages resulting therefrom by accident or casualty, while he is in the exercise of such care and caution as a prudent man would observe, under the circumstances surrounding him, to avoid injury to others; but he is answerable for damages resulting from negligence, or a want of such care and caution on his part."

In brief, the police officers were clearly in discharge of a duty enjoined upon them by law. They are responsible for injury only in case it resulted from their negligence. The burden of proof to substantiate this is upon the plaintiff to the end of the case, without shifting during the progress thereof, and to establish negligence it is not sufficient merely to show that a fatal accident happened. It must be the result of some proved shortcoming on the part of the defendants.

The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED. REHEARING DENIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued at Pendleton May 5, affirmed June 17, 1919.

HERR *v.* McALLISTER.

(181 Pac. 741.)

Specific Performance—Parol Contract—Satisfactory Proof.

1. Where the contract rests wholly in parol and the alleged promisor is dead, courts should demand clear and satisfactory proof of the terms of the agreement and its strict performance by the promisee.

[As to parol evidence on execution of contract, see note in 11 Am. St. Rep. 394.]

Wills—Contract by Testator to Convey in Consideration of Services—Evidence.

2. Evidence *held* insufficient to establish an oral contract by which testator promised to convey property to plaintiff in consideration of services in keeping house for him until his death; it appearing that she was fully compensated for her services.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

The plaintiff alleges that the defendants are the heirs and devisees under the last will of D. A. McAllister, deceased, which was executed on January 11, 1913, by which he bequeathed all of his property to the defendants, except Lot 16 in Block 2 of Grandy's Second Addition to La Grande; that D. A. McAllister died in April, 1918, and that under the terms of his will his son, Reece McAllister, one of the defendants, was appointed executor of the estate. The complaint avers that during the year 1914, and for a long time

prior thereto, the testator was the owner of the above described real property in La Grande; that in November of that year he was living in the house of the said premises and the plaintiff "was taking care of the house and home of said deceased and had been so engaged for about one year"; that about that time the deceased "entered into an agreement with the plaintiff, and in consideration of what she had previously done for said testator and that she would look after him and care for him and make him a home thereafter during the remainder of his life, he would and did give her, the plaintiff herein, the said described premises and the house situated thereon, together with the furnishings therein, for her care, labor and attention in making him a home, which she had already done and which she was to continue to do"; that plaintiff accepted his proposition and agreed to make a home and care for him and keep house for him until his death.

It is further alleged that the deceased was to make certain improvements in and around the house, pay the taxes, keep the property in good repair during his life and furnish provisions for the plaintiff and her two children, as a part of the consideration of the agreement between them; that pursuant to the alleged contract the plaintiff entered into possession of the premises and assumed control and has remained in possession of the same continuously and was in possession at the time of the death of D. A. McAllister; that she made a home for him and in all respects kept and performed her part of the contract; that at the time the alleged agreement was made it was understood that the deceased was to make out the proper papers to give her title to the premises; and that about June 7, 1915, he did draw a codicil to his will to that

effect, but the said codicil does not appear to be attached to the will and cannot be found.

It is alleged that the agreement has been carried out by both parties, except that the deceased failed and neglected to attach said codicil so the same can be found, or if he so attached it, the same has disappeared or has failed to come within the hands of the defendants in this cause; that the defendants have refused to give, deed or allow plaintiff the property in accordance with the alleged agreement and that she was led to believe and did believe that the proper papers had been executed by D. A. McAllister, and was not aware that they had not been so executed, until after his death.

The plaintiff prays that the alleged contract be specifically performed and that she be decreed to be the owner of said lot in said block in the City of La Grande, with the house thereon and the furnishings therein.

The defendants specifically deny each and every allegation of the complaint and allege "that the plaintiff was hired by D. A. McAllister as housekeeper and was fully paid the agreed and reasonable compensation for said service, by said D. A. McAllister, in money, board, provisions, clothing, lodging and maintenance." The plaintiff denies the new matter in the answer.

After a trial the court made findings of fact to the effect that the defendants are the heirs at law of D. A. McAllister, deceased, that during his life the latter was the owner of the lot in question; that there was never any agreement "to convey said property to the plaintiff or to give the same to her, although the said D. A. McAllister at one time intended to give said real property to the plaintiff, but he later changed his mind

and decided not to give said property to her." The court further found:

"The plaintiff received a large share of her board and that of her children, and the house rent for same, from Mr. McAllister in consideration of her services, and was fully and amply repaid for her services by the support which her children and herself received at the hands of Mr. McAllister. * * That plaintiff did not enter into possession of said premises and there was no change in possession of said premises. The plaintiff came to said premises as a housekeeper and there was no exclusive possession of said premises by the plaintiff."

Based upon these findings and the conclusions of law thereon, the trial court rendered a decree that the suit be dismissed and that neither party recover costs, from which the plaintiff appeals, claiming that the court committed error in its findings of fact and that she should have a decree as prayed for in her complaint.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. R. J. Kitchen.*

For respondents there was a brief and an oral argument by *Mr. R. J. Green.*

JOHNS, J.—The deceased D. A. McAllister, familiarly known as "Bud," was an old, prominent resident of Union County and the owner of considerable property exclusive of the town lot in controversy. For some time prior to his death with his wife he had resided upon the lot, and it was their home.

On account of his wife's sickness, the plaintiff was employed by them to do the work around the house and to take care of Mrs. McAllister. To regain her health, D. A. McAllister took his wife to California,

where she died and was brought back to La Grande for burial.

The plaintiff had three boys, two of whom were twins about the age of 10 years and the other about 23 years of age. After the death of the testator's wife, the plaintiff with her minor children continued to live at the McAllister home and performed the same kind of household duties that she did prior to the death of Mrs. McAllister.

It appears from the testimony that the home was of the probable value of about $3,000, and that it had a rental value of about $25 per month. The plaintiff admits that for the period of about three months after Mrs. McAllister's death there was no specific agreement between her and D. A. McAllister concerning the home place, but contends that in November, 1914, the oral agreement was made by which "he would and did give her" the home in consideration of what she had done and what "she was to continue to do" in taking care of and keeping house for him until his death, and that she accepted the proposition and performed her part of the agreement, and that in compliance therewith "Uncle Bud" paid the water rent and light bills, and the taxes on the home property which were assessed in his name; that he failed and neglected to give her the property during his lifetime and that the defendants refuse to carry out the agreement. It appears that the plaintiff and her two minor children had a home and that "Uncle Bud" purchased and paid for at least some of the provisions which they consumed, and made some improvements upon the property. For this he received nothing but his board and some little personal care and attention from the plaintiff.

There is no claim that any deed was ever executed or that there was any written contract. The deceased executed his last will on January 11, 1915, in and by which he devised all his property to the defendants, "except Lot 16 in Block 2 in Grandy's Second Addition to La Grande, Oregon, which property is not included in this will."

There is testimony tending to show that on June 7, 1915, attorney J. P. Rusk, at the request of the deceased, prepared a codicil to the will in and by which the property in question would have been devised to the plaintiff. The original will consisted of two typewritten sheets of paper, the first of which was signed by the deceased, and the second by the witnesses. The same was in the bank across the street from the attorney's office and Mr. Rusk testfies that he delivered the codicil to Mr. McAllister and advised him that to make it effective it would be necessary to attach it to and make it a part of the will itself, but there is nothing to show or indicate that the codicil was ever attached to or made a part of the original will, or what was ever done with the codicil after it was delivered to Mr. McAllister.

While it may be true that at one time Mr. McAllister did intend that the plaintiff should have the property in question at his death, as evidenced by the preparation of the codicil, the fact remains that there is no evidence that such intention, if any, was ever carried into execution, or that the codicil was ever attached to or became a part of the original will.

The plaintiff claimed and testified that at the time of the execution of the alleged oral agreement she entered into and took possession of the property, but she does not say how or in what manner she took possession and there is no testimony of any eviction or

ouster, that there was ever any change of possession, that she had any other possession after the alleged oral agreement than she had before, that the deceased ever intended to surrender or part with his property or that he conveyed or ever did intend to convey or part with the title to the property during his lifetime. On this question the facts are very similar to those in *Brown* v. *Lord,* 7 Or. 302, 314, where this court said:

"He, to all appearances, exercised as much authority and control after as he did before the alleged contract. He maintained and supported himself and his wife out of his own means, and no one could detect any change in the condition of his affairs which would lead him to suppose that the old gentleman had ceased to be the owner of the house in which he had lived so long. We think the possession of the premises by the respondent under the alleged parol agreement is not sufficient to take this case out of the operation of the statute."

1. The only evidence of the parol contract is the testimony of the plaintiff as to an alleged conversation which she claims to have had with the deceased. The law on this class of testimony is well stated by Mr. Justice MCBRIDE in *Hawkins* v. *Doe,* 60 Or. 437, 441 (119 Pac. 754, 756, Ann. Cas. 1914A, 765), on page 441 of the opinion:

"Where the contract rests wholly in parol and the alleged promisor is dead, courts should demand clear and satisfactory proof of the terms of the agreement, and its strict performance by the promisee. Such cases furnish abundant opportunity for the perpetration of those frauds which it was the object of the statute to prevent by requiring the contract to be reduced to writing."

On page 446 of 60 Or., page 757 of 119 Pac., Ann. Cas. 1914A, 765:

"Our statute requires the judge presiding at jury trials to instruct them that evidence of the oral admission of a party should be viewed with caution (Section 868, L. O. L.), and, if this is the rule as to admissions of parties living and able to explain their language and meaning, with how much greater force should it apply when the evidence is directed to the alleged declarations of one whose lips are sealed in death, and to establish a contract which the law requires to be in writing."

2. There is a mass of testimony as to the value of the services which were rendered by the plaintiff to the deceased, but when we take into consideration the fact that the plaintiff and her children had a home, that the deceased paid the taxes, the light and water bills, bought at least some of the provisions for all of them, and received nothing but his board and ordinary care and attention, we agree with the trial court that the plaintiff was fully compensated for her services. As a matter of fact we are convinced from the testimony that it was the understanding and agreement between them that one claim was to offset the other, and that there never was any contract by which the deceased promised or agreed to convey the home property to the plaintiff.

The legal contentions of plaintiff's counsel are sound, but they are not sustained by the evidence.

The decree is affirmed, without costs to either party.

AFFIRMED.

Argued at Pendleton May 6, modified and remanded June 17, 1919.

STATE *v.* NEWLIN.*

(182 Pac. 133.)

Intoxicating Liquors—Sale—Sufficiency of Evidence.

1. In prosecution of druggist for the unlawful sale of liquors, evidence *held* to establish guilt beyond any reasonable doubt.

[As to illegal sales of intoxicating liquors, see note in 12 **Am. St. Rep.** 353.]

Criminal Law—Appeal—Technical Error.

2. Where the evidence establishes plaintiff's guilt beyond any reasonable controversy, judgment of conviction will be affirmed under Article VII, Section 3, of the Constitution, notwithstanding technical errors.

Witnesses—Impeachment—Evidence of Crimes.

3. In prosecution for the unlawful sale of liquor, evidence that a witness who testified to having purchased liquor from defendant had himself been, at one time, a bootlegger, was inadmissible, where it was not claimed that witness had been convicted of illegal sales of intoxicating liquor.

Criminal Law—Evidence—Entrapment.

4. In prosecution for the unlawful sale of liquor, evidence that a witness who had testified to buying liquor from defendant had upon another occasion in another county liquor in his possession was inadmissible in support of theory that the liquor which defendant was alleged to have sold had been planted in his store by witness, where there was no evidence of a conspiracy to entrap defendant and no evidence to support such theory.

Criminal Law—Submission of Theories.

5. A party is entitled to have his theory of the case presented to the jury if there is evidence to support such theory.

Witnesses—Cross-examination—Motive and Interest.

6. In prosecution for unlawful sale of liquor, where detective had testified to buying liquor from defendant, it was not improper for court to refuse to permit defendant to continue cross-examining detective as to his motives and interest in the case, after his interest in case had been fully disclosed by cross-examination.

Criminal Law—Instructions—Entrapment—Evidence.

7. In prosecution of druggist for unlawful sale of liquors, requested instruction that defendant could not be convicted if the liquor in evidence had been planted in the store by the witness who testified to having purchased it, and the druggist had not in fact sold liquor, was

*On evidence of other crimes in prosecution of violation of liquor law, see note in 62 **L. R. A.** 230, 290, 325. REPORTER.

properly refused, where there was no evidence that the witnesses who had testified to purchasing liquor had brought the liquor to the store.

Criminal Law—Instructions on Evidence.

8. Court is not required to instruct specially upon every item of testimony introduced.

Criminal Law—Instructions—Singling Out Evidence.

9. It is bad practice to single out a particular item of testimony and give it undue prominence in an instruction.

Criminal Law—Second Offense—Indictment.

10. Defendant cannot be adjudged guilty of a second offense and sentenced accordingly, in the absence of an allegation in the indictment charging the prior conviction.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

The defendant was indicted upon a charge of unlawful sale of intoxicating liquor to one Ed Johnson. Upon the trial the testimony of the state was substantially as follows: The defendant, at the time the alleged offense was committed, was engaged in conducting a drug-store in La Grande, Oregon, known as the La Grande Pharmacy, which, in addition to carrying drugs, also dealt in candies and other articles frequently sold in such establishments.

The county officials, in the course of their investigations into alleged violations of the liquor laws, got into communication with one John E. Smith, also called Joe Smith, who had been working in connection with the Baker County officers in the detection of such offenses, and engaged him to do similar detective work in Union County.

While in La Grande for this purpose, Smith met Ed Johnson, whom he had formerly met in Pendleton, but who had recently been working with a threshing crew in Union County. Johnson invited Smith to go with him to Newlin's drug-store and get a drink.

They entered the store and called for drinks, which were served to them from a bottle behind the prescription counter. The liquor had the color and general appearance of whisky and an intoxicating effect. Newlin remarked that it was pretty strong stuff. The price charged by Newlin was twenty-five cents a drink. They discussed with Newlin the question of buying four dozen pint bottles of the liquor, but said they would see if they had the money to pay for it. Smith reported to the chief of police of La Grande, who furnished him with $20, which, with the money he had, made $50, sufficient to purchase 14 pints of the liquor. He then returned and found that Newlin had three candy buckets packed with the mixture. After paying $50 for a bucket containing 14 pints, he took it to his room. For the purpose of disguising the contents, some grapes and apples were placed on top of the bucket.

Late in the afternoon, about 6 P. M., Johnson went back and purchased a small candy pail of the liquor, paying therefor $21.50, was arrested while on the way to his room with it, indicted for having intoxicating liquor in his possession, plead guilty and was sentenced to 60 days in jail and a fine of $300, which sentence he was serving at the time of the trial of the case at bar.

It was for this sale Newlin was on trial in the instant case. The back room of his store was searched and a third candy pail, packed with intoxicating liquor, was found. There was a slight flavor of sweet spirits of nitre in the compound, and several jugs, which had contained that drug, were found in the back room of the drug-store.

It was testified by a competent chemist that sweet spirits of nitre is a highly volatile substance, which evaporates at a lower temperature than alcohol, and that by exposing it to the air in a flat container, the nitre would evaporate, leaving the alcohol constituent remaining. The theory of the state was, that the alcohol in the liquor had been obtained either by this process or by some other method of distillation. All the liquor sold to Johnson or Smith, or seized by the authorities, contained about 36 per cent of alcohol by volume.

Other witnesses testified to having bought similar liquor of defendant from time to time. Other facts appear in the opinion.

The defendant was convicted and sentenced to be confined in the county jail for a period of one year, and to pay a fine of $100, the judgment reciting that this was the second conviction under the Prohibition Act.

MODIFIED AND REMANDED.

For appellant there was a brief with oral arguments by *Mr. Francis S. Ivanhoe* and *Mr. R. J. Green.*

For the State there was a brief over the names of *Mr. John S. Hodgin*, District Attorney, and *Mr. George M. Brown*, Attorney General, with an oral argument by *Mr. Hodgin.*

McBRIDE, C. J.—1, 2. In spite of technical points suggested by able and ingenious counsel for appellant, there is one fact established beyond any reasonable controversy, namely: That the evidence proved beyond a doubt not only that the defendant was guilty in the present instance, but also that he was a frequent and persistent violator of the law, practically conducting

a saloon for the sale of intoxicants under the guise of a drug-store. Admitting that the principal witness for the prosecution is a man of bad reputation, and that the person to whom defendant sold the liquor is of doubtful character, no sane, fair juryman could have listened to the testimony adduced and thereafter have entertained the least doubt as to the guilt of the defendant. And perhaps we could stop at this, so far as the principal contention is concerned, and base our decision upon Article VII, Section 3, of our amended Constitution, but in deference to the able argument of counsel for the defense, we will consider briefly the objections urged by them.

3. Much is made of the refusal of the court to allow evidence to be introduced that the witness Smith had, himself, been a "bootlegger," and had offered to sell whisky to persons in Baker County. The evidence was irrelevant to any issue in the case on trial, and was properly excluded. It was not claimed that he had ever been convicted of illegal sales of intoxicating liquors and the evidence of such offers was no more admissible than would have been evidence that he had attempted to commit assault and battery, or any other misdemeanor.

4. It is claimed the evidence was material as tending to show that Smith had liquor in his possession, and that it was within his power to have taken it to the La Grande Pharmacy and "planted" it there, in order to entrap Newlin. In other words, it was proposed to prove that Smith possessed liquor, which he might have used for such purpose, by showing that upon another occasion, in another county, he had said that he then had liquors, and to bind the state in the instant

case by these unsworn declarations. There is no rule under which such testimony is admissible.

There was not the slightest evidence that Smith and Johnson were engaged in a conspiracy to entrap Newlin. Smith took advantage of his acquaintance with Johnson, and Johnson's confidence in him, to discover that Johnson was buying liquor from Newlin, and thereupon had him arrested, fined and sent to jail. That this was a part of a conspiracy entered into by Johnson to entrap Newlin, is giving him credit for a zeal in enforcing the liquor laws that passes human credulity. Nor was there any evidence that Johnson "planted" any liquor in the back room of Newlin's place of business. A witness did testify that late in the evening of the day when Newlin was arrested, he saw an automobile drive near Newlin's back door and saw the witness Johnson get out with a box about the size of an apple box. He did not see what was done with the box; had no idea of its contents, and upon this apocryphal story counsel would build up a theory that Johnson was engaged in a conspiracy to place the liquor, which he subsequently took away, in the candy bucket and thereby ensnare Newlin.

5. A party is entitled to have his theory of the case presented to the jury if there is evidence to support such theory, but there is absolutely no evidence to support the theory that the liquor Johnson was arrested for carrying away at half-past 6 in the evening, was placed by him in the drug-store at half-past 5, or that he ever put any liquor in the drug-store.

Error is predicated upon the ruling of the court, sustaining objections to questions, asked witness Smith by counsel for defendant, concerning his motives for engaging in the prosecution of this case. Upon the cross-examination Smith was questioned very closely

as to his motives for engaging in the detective work, and answered, among other things, the following questions:

"Q. Now, the interest you have in this case, Mr. Smith, is the money consideration you can get out of it, isn't it?

"A. It is the good I can do for the country.

"Q. Patriotic good, I suppose?

"A. Well, I am here to make some money out of it too."

He was then asked, if—upon the preliminary examination—he did not say: "I ain't here just for the sport there is in this," and denied using those exact words, but admitted he did say part of it, and that he expected to get paid for his services. In the Justice's Court, in answer to interrogations in regard to whether or not he expected to be paid for his services, he answered, "I wasn't here for my health." The witness admitted he expected to be paid for his services; how much he did not know, but that he was employed as a detective and expected to be paid.

Several other questions, relating to motive, were asked and objections to them were sustained, but even if the answers had been permitted, and they had been in the affirmative, they would have added nothing to the force of the facts already elicited, namely: That the witness was a hired detective, brought in the county under promise of a reward, which he expected to get, and which was uncertain in amount.

6. The jury must have been fully aware of his motives, and while it perhaps would have been as well for the court to have allowed counsel to turn him inside out upon cross-examination, it was not improper for the court to check it when the interest of the witness

was as fully disclosed as it was here by what had already been elicited.

Counsel for appellant asked the following instruction, which was refused by the court:

"I instruct you, that if you believe from the evidence in this case, that the liquor in evidence was brought to said store by Ed Johnson, or by Ed Johnson and Joe Smith, and that the defendant Adolph Newlin, did not sell said liquor to said witnesses, then you should find the defendant not guilty."

7–9. There was no evidence that either Smith or Johnson brought the liquor to the store and the instruction was properly refused. Even if there had been such evidence the general instruction, that the jury could not convict unless they were satisfied beyond a reasonable doubt that Newlin sold the liquor to Johnson, was sufficient to cover all that defendant was entitled to have given on that subject. The court is not required to instruct specially upon every item of testimony introduced. Indeed, it is bad practice and sometimes reversible error to single out a particular item of testimony and give it undue prominence in an instruction.

Other parts of the court's charge are criticised, but we consider the objections without merit.

10. It was also suggested upon the argument that it was error to adjudge the defendant guilty of a second offense and sentence him accordingly, in the absence of an allegation in the indictment charging the prior conviction, and this seems to be the general holding of the courts: 22 Cyc. 356, and cases there cited.

The judgment will therefore be set aside and the cause remanded to the Circuit Court with direction to re-sentence the defendant, without taking into consideration his prior conviction for a like offense. In all

other respects the proceedings in the lower court are affirmed. REMANDED WITH DIRECTIONS.

BENSON, BURNETT and HARRIS, JJ., concur in the result.

Argued at Pendleton May 6, modified and remanded June 17, 1919.

STATE *v.* NEWLIN.*

(182 Pac. 135.)

Criminal Law—Intoxicating Liquors—Former Conviction—Separate Offenses—Question for Jury.

1. Where druggist discussed unlawful sale of intoxicating liquors to two customers, to whom, later in the day, at different times, he sold liquor, each sale was complete in itself and a separate offense, and the submission to the jury of the question of former conviction *held* not justified.

[As to being twice in jeopardy for same offense, see note in 64 Am. St. Rep. 381.]

Intoxicating Liquors—Criminal Prosecution—Separate Offenses.

2. Where seller of intoxicating liquors makes unlawful sale to customer who pays for the liquor and removes it from seller's place of business and thereafter returns and buys another package of liquor, the two sales constitute two separate offenses.

Criminal Law—Third Offense—Indictment.

3. Defendant cannot be convicted of third offense and sentenced accordingly, in the absence of an allegation in the indictment charging the prior conviction.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

The defendant was indicted and tried for the crime of having sold intoxicating liquor to one John E.

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*For authorities passing on the question as to right to convict for several violations of the liquor law growing out of same facts, see note in 31 L. R. A. (N. S.) 707, 712, 725.

As to necessity for allegation in indictment of defendant's previous conviction to impose increased penalty, see notes in 23 Cyc. 290; 24 L. R. A. (N. S.) 432, 436; 9 Ann. Cas. 768. REPORTER.

Smith. The circumstances of the alleged offense are set forth in the statement preceding the opinion in the case of the *State* v. *Newlin, ante,* p. 589 (182 Pac. 133), in which case we set aside the judgment pronounced upon a conviction for having sold intoxicating liquor to one Ed Johnson. In addition to a plea of guilty, defendant entered a plea of former conviction, based upon the judgment rendered in the case of the *State* v. *Johnson.*

There was a verdict of guilty as charged, and the court, assuming judicial knowledge of the conviction in the Johnson case, and in some other case the particulars of which do not appear herein, sentenced the defendant, as upon a third conviction, to pay a fine of $100, and be imprisoned in the county jail for a period of one year, as provided in Section 36, 1915, Oregon Laws. Other facts appear in opinion.

MODIFIED WITH DIRECTIONS.

For appellant there was a brief with oral arguments by *Mr. Francis S. Ivanhoe* and *Mr. R. J. Green.*

For the State there was a brief over the names of *Mr. John S. Hodgin,* District Attorney, and *Mr. George M. Brown,* Attorney General, with an oral argument by *Mr. Hodgin.*

McBRIDE, C. J.—The prosecution followed the general line adopted in *State* v. *Newlin, ante,* p. 589 (182 Pac. 133), which involved a sale of intoxicating liquors to Ed Johnson, and the rulings of the court on the questions there involved were practically the same, the new questions involved being substantially the plea of *autrefois convict,* and the sentence as for a third conviction.

1, 2. There was no evidence to justify the submission to the jury of the question of former conviction. While the matter of purchasing the liquor was discussed by the defendant in the presence of both Smith and Johnson, the sale to each was separate and complete in itself. Smith went alone and paid for his bucket of bottles with his own money and with the intention of thereby procuring evidence to convict the defendant of an unlawful sale. When he paid for the liquor and took it away the transaction was complete, and so far as he was concerned he was the sole owner of the liquor so purchased, if anyone can be said to be the owner of liquor disposed of and received under such circumstances. Johnson went later and paid $21.50 for his bucket of bottles and took it away for his own purposes, and Smith had no interest in the result of the transaction. In fact, if Smith had purchased the $50 package of liquor and paid for it and taken it away first and afterwards had returned and taken the $21.50 package and paid for it, these acts would have constituted two separate offenses.

This is a much stronger case against defendant than *State* v. *Stewart,* 11 Or. 52, 238 (4 Pac. 128), in which it was held that a person may, by one act, commit two distinct crimes, a particular instance of which is where a person by a single shot wounds or kills two people. The plea was not sustained by any evidence.

3. It is suggested in the brief that the court erred in imposing a sentence as for a third conviction. There is no allegation in the indictment that the defendant had been previously convicted of like offenses, and, as shown in the Johnson case just decided, such a sentence was not authorized in the absence of a proper allegation in the indictment: 22 Cyc. 256.

For this error the judgment of the Circuit Court is set aside and the cause remanded with directions to re-sentence defendant without regard to any previous conviction. In all other matters the proceedings of the lower court are affirmed.

REMANDED WITH DIRECTIONS.

BURNETT, BENSON and HARRIS, JJ., concur in the result.

Argued June 5, affirmed June 24, 1919.

HAGER *v.* CLATSOP COUNTY.

(181 Pac. 743.)

Taxation—Delinquent Taxes—Purchase and Sale by County—Title of Purchaser—Taxes Satisfied.

1. Under the statutory scheme for collection of delinquent taxes as embodied in Sections 3713, 3717, 3718, L. O. L., as amended by Laws of 1913, Chapter 184, purchaser at sale by county of land it had bought for taxes of one year, takes it discharged of all subsequent taxes, certificates of delinquency for which had been issued to the county, and subject only to taxes of the current year; that is, the year in which the sale is made.

[As to tax sales, see note in Ann. Cas. 1916D, 48.]

From Clatsop: JAMES A. EAKIN, Judge.

Department 1.

In effect, this is a suit to quiet the plaintiff's title in certain lands in Clatsop County. Without quoting the pleadings *in extenso*, it is sufficient to say that the state, county and general municipal taxes were duly assessed against these lands for the year 1909. No part of the taxes having been paid, certificates of delinquency were issued to Clatsop County on December 3, 1914. On June 5, 1915, the county instituted pro-

ceedings in the Circuit Court to foreclose the certificates, which resulted in a final decree of date September 7, 1915, directing a sale of the lands for the satisfaction of the delinquency evidenced by the certificates. On October 26, 1915, at a sale under execution issued on the decree the land was sold to Clatsop County. On July 18, 1916, in pursuance of the statute the County Court directed the sheriff to publish notice that he would sell the lands thus acquired by the county, on October 19, 1916, to the highest bidder for cash at the time and place named in the notice. As a result, the lands were sold to B. L. Ward, the original plaintiff herein, and a deed was executed by the sheriff as of the date of sale and delivered to Ward. Taxes had been levied against the land for each of the years subsequent to 1909 up to and inclusive of the year 1915.

As no one else applied for a certificate of delinquency, such certificates were issued to the County Court for the year 1910, and on January 16, 1916, the county instituted a suit to foreclose them and obtained a decree of foreclosure on July 8, 1916. An execution issued upon the decree last named and at this point in the history of the transactions the plaintiff began this suit to restrain the sale under the last decree and to quiet his title to the property.

The contention of the plaintiff is that the sale of the land to him by the county, followed by its conveyance, automatically satisfied and discharged all of the taxes against the premises, except those current at the date of sale. On the other hand, the contention of the county is that the only tax affected was that of 1909. The court rendered a decree in favor of the plaintiff according to his prayer, and the defendant county and its sheriff have appealed. AFFIRMED.

For appellants there was a brief over the names of *Mr. Edw. C. Judd*, District Attorney, and *Messrs. G. C. & A. C. Fulton*, with an oral argument by *Mr. G. C. Fulton*.

For respondent there was a brief and an oral argument by *Mr. J. Q. A. Bowlby*.

BURNETT, J.—1. According to the statutory scheme for the collection of delinquent taxes, as embodied in Chapter 8, Title 28, L. O. L., and the amendment thereto as set forth in Chapter 184, Laws of 1913, at the expiration of a certain time after taxes become delinquent, on the application of any individual it shall be the duty of the sheriff to issue certificates of delinquency against the property containing certain details respecting the amount of tax and interest due and the name of the owner to whom the same is assessed, and other particulars, and this certificate constitutes a lien upon the realty mentioned therein. At any time after the expiration of three years from the first date of delinquency of any tax included in such certificate, the holder may institute proceedings for the foreclosure of the same. It is the duty of a private person holding a certificate of the sort to pay all the taxes which have been assessed against the property both before and after its issuance, failing in which, he will forfeit his certificate to any subsequent certificate holder, so that at the suit of a private person the decree of foreclosure will include all taxes of whatsoever kind which he has paid. If no one applies for certificates of delinquency, the sheriff is required to issue such certificates from time to time to the county, but unlike the duty to pay all taxes, which is enjoined upon a private person, there is no obligation on the part of the county

to pay any delinquent taxes. The county also may bring suit to foreclose the delinquency certificates issued to it by the sheriff and, in the absence of other bidders at a sale on execution issued upon such decree of foreclosure, the county automatically becomes the bidder for the whole of the tract for the face of the decree, and the property is struck off to it.

Section 3713, L. O. L., reads thus:

"No claims shall ever be allowed against the county in favor of any municipality, school district, road district or other taxing district for taxes levied on property acquired by the county by tax deed under the provisions of this act, but all taxes shall at the time of deeding said property be thereby canceled; *provided*, that the proceeds of any sale of any property acquired by the county by tax deed shall be justly apportioned to the various funds existing at the date of the sale in the territory in which such property is located, according to the tax levies of the year last in process of collection."

Under Section 3717 it is required that in pursuance of an order of the County Court there shall be held annually a sale of lands—

"Theretofore bid in for taxes by such county or any public corporation therein, and to which such county or any such public corporation shall have acquired title, as provided by the laws heretofore in force or as provided in this act."

These words appear in the act of 1907. They are also employed in the amendatory act of 1913. Manifestly the procedure there outlined applies not only to lands which the county bought in at sales held before the act of 1907, but as well to lands acquired since then. Having in mind, then, that we are dealing with lands to which the county acquired title by purchase at its own foreclosure sale, we look to the statute for

the effect of a sale by the county of its own lands thus acquired. It is said in Section 3717, L. O. L., as amended by Chapter 184, Laws of 1913:

"No parcel of land shall be sold more than once, and the sale of any parcel shall be construed to pass all of the right, title and interest of the county or other municipality to which the same has been sold by virtue of the taxes for which the same was sold, and any subsequent taxes advanced by such county or municipal corporation, and also all delinquent taxes, excepting the taxes for the current year, and the lien of subsequent tax certificates to individuals."

Remembering the conditions disclosed by the record before us, we note that the county had bought in the land for the taxes of 1909. There had been issued to it from time to time annually certificates of delinquency for the taxes of succeeding years. Applying to this situation the provisions of the section last above quoted, the sale to the plaintiff passed all the right, title and interest of the county which it had by virtue of the taxes for 1909. More than that, it also passed the interest of the county by virtue of all the subsequent taxes, which interest was represented by the subsequent certificates of delinquency. Still further, it passed the interest of the county as to all delinquent taxes without other exception than the taxes for the current year, which must mean the taxes for 1916, that being the year in which the sale was made to the plaintiff, and the further exception of any subsequent delinquent tax certificate issued to some individual. It was possible that for any of the years subsequent to 1909 any individual might have applied for a certificate of delinquency on the realty involved. Upon him would have rested the obligation of paying all manner of taxes under the provision of Section 3704, L. O. L., as amended by the act of 1913. But no

such certificate appears in the record and hence the only exception in derogation of the title passed to the purchaser by the sale of the county of the lands which it had obtained at its own foreclosure sale is the tax current for the year in which the sale was made to the plaintiff.

The same effect is reiterated in Section 3718, L. O. L., as amended, where it is said of deeds given to purchasers of land from the county:

"Such deeds shall vest in the purchasers title in fee thereto, and such title shall be superior to any lien, claim or charge whatever against such lands, except the lien of tax certificate of delinquency issued to an individual, subsequent to that for which the land was sold, and the taxes for the current year."

Referring again to the language of Section 3717, we note that, "No parcel of land shall be sold more than once." If the contention of the county is to prevail, it could sell its land as many times as it has certificates of sale, and the purchaser could not be certain whether he would acquire title or not. If the county would obtain money enough to cover the taxes for all the years of delinquency, it should in its order for sale under Section 3717 fix an upset price at which the bidding must be started, and which is equal to the aggregate of all its demands. It seems not to have done so in the present instance, and hence the title passed to the plaintiff at the price which he offered. It is manifest also that the sale by the county of lands which it had acquired at its own foreclosure sale must carry the full title, because it is provided in Section 3713, already quoted, that the proceeds of the sale of such property shall be apportioned to the different funds existing at the date of sale, according to the tax levies of the year last in process of collection. In other

words, the different funds will partake in the proceeds of the sale *pro rata*, not according to the ratio existing at the time the certificate of delinquency was issued or the sale made to the county, but according to the latest tax levy in process of collection.

Considering, therefore, that there can be but one sale of land bid in by the county, that it passes all title of the county which it holds not only by virtue of the sale to it but by virtue of all certificates of delinquency issued to it, and that it cancels all taxes at the time the deed is issued, with the exceptions noted, it is obvious that the plaintiff took title to the land to the exclusion of all tax claims whatsoever, except those current at the date of his deed. The decree of the Circuit Court is affirmed. AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued February 25, reversed and remanded March 18, rehearing denied June 24, 1919.

DE VOL *v.* CITIZENS BANK.

(179 Pac. 282; 181 Pac. 985.)

Trusts—Parol Evidence—Statute of Frauds.

1. Where a sister holding realty in trust for her brother on his order and request signed deed to a buyer in recognition of the parol trust, her testimony that she had held the property in trust for her brother was not inadmissible, as in violation of the statute of frauds, in the brother's action to recover his deposit made to cover paving liens.

Trusts—Parol Trust—Sale of Property—Proceeds—Right of Beneficiary.

2. Where a sister held realty deeded to her by her brother under parol trust for his benefit, and joined in execution of his deed to a buyer, the purchase price became the brother's property as much as though he had previously held the legal title.

Banks and Banking—Deposit to Cover Liens—Part of Price.

3. Where a sister and brother, the former holding realty under parol trust for the latter, conveyed to a buyer, it must be assumed that money held by a bank as a deposit to cover paving liens primarily belonged either to the brother or sister; it having been a part of the purchase price of the property.

Banks and Banking—Action to Recover Escrow Deposit—Fact and Purpose of Deposit—Questions for Jury.

4. In action by vendor of realty to recover from bank a deposit made with it of part of purchase price in escrow to cover paving liens, whether the money was deposited with the bank by plaintiff, and the purpose for which it was deposited, *held* for the jury under the evidence.

Evidence—Implied Admission—Failure to Answer Letter.

5. Where vendor deposits in bank in escrow part of purchase price as security for paving liens, correspondence between him and bank in relation to transaction is evidence thereof, and where he wrote bank stating transaction in a certain way, and bank did not disclaim, or otherwise answer, vendor's letter, with fact it was not answered, is evidence in nature of an implied admission as to truth of facts stated.

Jury—Action Against Bank—Escrow Deposit—Legal Nature.

6. An action by the vendor of land against a bank with which he had deposited part of the price of the land in escrow as security for paving liens, being in nature of action for money had and received for his benefit, was not a suit in equity, but an action at law, properly tried before a jury.

Evidence—Parol Evidence Affecting Writing—Covenant of Warranty—Escrow Deposit.

7. In action by vendor against bank to recover part of price deposited in escrow as security for paving liens, evidence of contract alleged by plaintiff *held* not inadmissible as varying terms of covenant of warranty in his deed, but related to an independent transaction.

[As to effect on rights of parties of unauthorized delivery by escrow-holder, see note in **Ann. Cas.** 1917E, 427.]

Banks and Banking—Escrow Deposit—Question for Jury.

8. In brother's action against bank to recover escrow deposit of part of price of realty conveyed by him and his sister, deposit having been made to secure paving liens, whether property sold and money deposited in bank were property and money of sister, and not of brother, *held* for jury under evidence, a question submissible by proper instruction.

Trial—Submission of Theory to Jury.

9. Where the contention of either party is alleged in the pleadings and sustained by evidence sufficient to go to jury, he has the right to have that theory submitted.

ON PETITION FOR REHEARING.

Estoppel—Testimony of Witness of Adverse Party.

10. A party in a case cannot be estopped or concluded by the mere testimony of a witness offered by the adverse party.

From Multnomah: Robert Tucker, Judge.

Department 2.

This is an action to recover $1,000 alleged to have been deposited by the plaintiff with the defendant,

to be held by it as a sort of stakeholder, in a transaction between the plaintiff and Lambert & Whitmer, who had purchased from the plaintiff and his sister certain real estate in the City of Portland, in relation to the payment of certain paving liens, which had been assessed against the property by the city.

About September 1, 1905, the plaintiff and his sister, Mary De Vol, conveyed to A. W. Whitmer for Lambert & Whitmer, the property in question. At the time the legal title to the property was in the name of Mary De Vol; but it is claimed by the plaintiff that she was merely the trustee of the property for George De Vol, who is claimed by the plaintiff, to have been the sole beneficial owner.

At the time of the transaction there were paving assessments standing against the property, to the amount of about $845, which were then in litigation between the De Vols and the city.

The De Vols executed a warranty deed to the property, and, in addition thereto, a certain sum was held out of the purchase price and deposited in the defendant's bank, to be held by it in relation to the aforesaid assessments, but the terms and conditions under which it was to be held are in controversy between the parties, as will hereafter appear. The exact amount held out is also in controversy, plaintiff claiming it was $1,000, the defendants, that it amounted to but $950. This deposit is the subject of this litigation.

Plaintiff claims it was deposited under an agreement and understanding that it should be held by the bank until the litigation was settled, and that the plaintiff was to have ample time to litigate the same. The defendant, on the other hand, claims it was to be held as security to satisfy the liens, and that if said improvement ever became a valid charge or lien against

said property, either by assessment or reassessment, the deposit should be applied to satisfy the same. The defendant also claims that the purchase of the land was made from Mary De Vol, and that the arrangement for the deposit at the bank was also made with her and not with the plaintiff, George De Vol. It is undisputed that it was also agreed at the time that pending the settlement of the liens, the deposit was to draw interest from the bank, at the rate of 4 per cent per annum.

A short time after this transaction, Lambert & Whitmer sold the real property, conveyed to them by the De Vols, to one James Monks, who gave to them notes and a mortgage for about $5,000 of the purchase price. These notes and the mortgage were afterwards transferred by Lambert & Whitmer to one Clark and were all paid off by Monks, except about $1,100, which was held back by him under an agreement with Lambert & Whitmer, that he might so hold the same as security for the payment of these liens. On September 16, 1908, the defendant applied, or permitted Lambert & Whitmer to apply, the De Vol deposit upon the notes of Monks to Lambert & Whitmer, which had been transferred to Clark.

The litigation over the assessments was continued in one shape and another for many years, and never was disposed of. The assessments, which were pending at the time of the conveyance from De Vol to Whitmer, were set aside by the court, but the city proceeded to make a reassessment. The plaintiff, through his attorneys, continued to litigate this reassessment, both by writ of review and by appeal from the assessments. The writ of review was finally decided in favor of the city, but the appeal was still pending. In 1915 Monks, who was then the owner of the property, without au-

thority from or arrangement with DeVol, compromised the assessments and paid them off, thereby releasing the property from the city's liens upon the same.

REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Malarkey, Seabrook & Dibble,* with an oral argument by *Mr. Arthur M. Dibble.*

For respondent there was a brief over the names of *Mr. Ralph R. Duniway* and *Mr. George N. Woodley,* with an oral argument by *Mr. Duniway.*

BENNETT, J.—1. The first question presented by the appeal is whether or not the court erred in permitting George De Vol and his sister, Mary De Vol, to testify that while the legal title to the property was in her name, she held it under a parol trust, and that the plaintiff was really the beneficial owner. This question is presented by assignments of error 1, 2, 3, 4, 5 and 6. All of the questions presented in these assignments are fully covered by assignment 3, where Mary De Vol was asked:

"State fully why George De Vol deeded said property to you. What, if any, consideration did you pay him for doing so, and whether you owned the property or did you hold only the legal title to said property for said George De Vol?

"A. He deeded said property to me so if he should fail in business we would always be sure of having a home. I paid no consideration whatever to him for deeding the property to me, and I did not own the property after I received the deed to it. I only held the legal title to said property for my brother, who was in possession of the same. * * "

It is strongly urged on behalf of appellant, that this was an attempt to prove a trust by parol evidence, and was in violation of the statute of frauds, and that Mary

De Vol, and not the plaintiff, must be conclusively assumed to have been the owner of the real property deeded by her and her brother, and therefore also, of the money, which was part of the purchase price.

We do not think this contention can be sustained. It is conceded that she joined with her brother in executing the deed to Whitmer. Both Mary De Vol and her brother testified that she did this at his request, and she testified that she had nothing to do with the transaction except to sign the deed, and that both the property and the money arising from its sale really belonged to her brother, plaintiff herein. If this was true, the transaction between Mary De Vol and her brother, became in the nature of an executed trust. She held the property subject to his use and disposition, and, upon his order and request, she signed the deed to Whitmer in full recognition of the parol trust. Under such circumstances, and when the trust has been so acknowledged and executed, the reason for the rule against admitting parol evidence fails, and when the reason fails the rule fails with it.

In Perry on Trusts it is said:

"And the statute of frauds will be satisfied if the trust can be manifested or proven by any subsequent acknowledgment by the trustee, as by an expressed declaration, or any memorandum to that effect; or by letter under his hand, or by his answer in chancery, or by his affidavit": Vol. 1 (6 ed.), § 82.

And in the work of Mr. Beach on the same subject, it is said:

"Where the purpose of the grantor to create a trust is not set forth in the instrument by which the estate is conveyed, it may be adequately declared and proved by the testimony of the trustee to whom it is conveyed, or who is the holder of the legal title. This declaration may be made at the time of the conveyance or at a later date": Beach on Trusts, § 39.

And this is the doctrine announced by our court in *Richmond* v. *Bloch*, 36 Or. 594, 595 (60 Pac. 385, 386), in which it is said:

"The adjudicated purpose of the statute, however, is not to declare such a parol or verbal trust illegal, and therefore a nullity. But the trustee may elect to perform the conditions thereof, notwithstanding the absence of compulsory power; and the courts will, if he chooses to act upon his verbal promise, protect him in the execution of the trust, and, as far as possible, will protect the beneficiaries in the enjoyment of the fruits of its execution, and when once the trust is executed it cannot be revoked."

And again building upon and quoting with approval from *Sieman* v. *Austin*, 33 Barb. (N. Y.) 9, the court says:

"The law refuses its aid to enforce agreements creating trusts or charges upon lands when they rest altogether in parol, not because the trusts are therefore void, but because it will not permit them to be proved by such evidence. But when a person who has received the title to lands purchased for the benefit of another, although without having declared the fact in writing, recognizes and fulfills the trust, it is not the duty of the court to deny its existence. * * If he fulfills the trust by conveying the property to the true owner, there is no rule of equity which will impeach the title thus acquired."

And again, quoting from an Indiana case, *Hays* v. *Reger*, 102 Ind. 524 (1 N. E. 386):

"This statute, as also the statute of frauds, was enacted, not that parties might avoid trusts which were executed, but rather to enable them, in case of an attempt to enforce such trusts while they remain executory, to insist on certain modes of proof in order to establish them. The trust having been executed, we need not determine whether it was one arising by implication of law, or whether it was an express trust.

Whether it was one or the other, the parties having voluntarily executed it, the authorities are that it may be proved by parol for the purpose of showing that the apparent owner had no interest which was subject to the lien of a judgment against him."

Neither the statute of frauds nor our similar statutes, were ever intended to prohibit men and women from being honest; or from observing or carrying out in good faith their moral obligations, if they choose to do so.

2. If, as testified by the plaintiff and his sister, George De Vol was the real beneficial owner of this property, and Mary De Vol saw fit to join in the execution of this deed at his request, for the purpose of carrying out her moral obligation to dispose of the property, according to his direction, there was no reason why she should not do so, and under such conditions the purchase price would become his property, just as much as though he had previously held the legal title.

There was a motion for a nonsuit, and also a motion for a directed verdict. The order of the court denying these motions makes up appellant's assignments 8 and 10, and in support thereof it is urged that there is no competent evidence that the contract alleged was ever made, and no competent evidence that plaintiff ever made any deposit with defendant at all, but we think there was no error in refusing these motions.

3. The evidence of the plaintiff as to what occurred at the time of the transaction is not very clear, but there can be no question that the money was actually deposited in the bank, and accepted by the bank as a deposit, and that it was to be held with some relation to these liens. It must also be assumed, that this money primarily belonged to one or the other of the

De Vols, because it was a part of the purchase price of their property.

In addition to this are the letters from De Vol to the bank and to Lambert, who was its cashier or president. The first of these letters is dated November 6, 1910, and is as follows:

"1695 Adeline St., Oakland, Cal.
"Nov. 6th, 1910.

"Pres. of Citizens Bank,
"Portland, East Side, Or.

"Dear Sir:

"Not knowing what the street assessment would be on Pettygrove and 17th Sts., Portland, Or., *I left $1,000 in the above Bank* in the fall of 1905. Will you please let me know if the assessment has been settled or what has been done since that time, and oblige

"GEORGE DE VOL."

The second letter was dated January 14, 1915, and is as follows:

"2339 Adeline St., Oakland, Cal.
"January 14th, 1915.

"Mr. Lambert:

"Will you please let me know what has been done about the reassessment of 17th St.? *You remember I left $1,000, One Thousand dollars in your bank* at 4% in 1905 *in case the city should win the suit.* I, with others, had signed over to Ralph Duniway at that time, as it is now 10 years I should think the case should be settled.

"Please let me hear from you soon.

"Very truly,
"GEO. DE VOL."

The third was written January 23, 1915, as follows:

"2339 Adeline St., Oakland, California.
"Jan. 23rd, 1915.

"Mr. Lambert.

"Dear Sir:

"I wrote you not long ago, and have not heard from you, about the $1,000 at 4% *I deposited in the Citizens*

Bank as collateral in case the city won the suit over the re-assessment of 17th St. I want to have a settlement and hope you will let me hear immediately from you.

"Very truly,

"George De Vol."

The fourth was dated May 16, 1915:

"2339 Adeline St., Oakland, Cal.

"May 6, 1915.

"Dear Sir:

"*I left $1,000 at 4 % in Citizens Bank in Fall of 1905*, this amount was left in escrow of the assessment of 17th and Pettygrove St. It was then in the hands of a lawyer to be settled. A. W. Lambert was then Pres. of the Bank and surely he remembers the transaction, as he bought the property. I wish to know if your books show that I paid that money into the Bank.

"Please let me know soon, and oblige

"George De Vol."

It is admitted that these letters were received by the parties to whom they were addressed, and indeed they were produced at the trial by the *defendant*. The plaintiff testified that he received *no answers to these letters*, except to the one of May 6th, which was dated May 11, 1915, and is as follows:

"Portland, Oregon, May 11, 1915.

"Mr. George De Vol.,

"2339 Adeline St.,

"Oakland, Cal.

"Dear Sir:

"This is in reply to your letter of May 6th regarding *$1,000.00 left here in 1905*. Mr. Dunniway has recently written you a letter regarding the status of this property. The $1,000.00 you mention was applied on the note held by Dr. E. G. Clark.

"Yours truly,

"Citizens Bank.

"By M. Redmond."

4. The defendant was challenged to produce any carbon copies of answers to the other letters which it might have, and none were produced. There was no evidence of any other answers having been written, except the evidence of Mr. Lambert that he had written one letter in long hand and kept no copy. These letters, with the answer to the one, and the fact that the others were unanswered (if the jury so found) together with the oral testimony of Mr. De Vol, were sufficient evidence to go to the jury tending to prove that the money was deposited with the Citizens Bank by George De Vol and the purpose for which it was deposited.

5. It is well settled that in a transaction of this kind, the correspondence between the parties, in relation to the transaction, is evidence thereof, and that where one party has written to the other, stating the transaction in a certain way, and the other party has made no disclaimer, or other answer to the letter, the letter itself, with the fact that it was not answered, is some evidence, in the nature of an implied admission, as to the truth of the facts stated therein. Altogether, there was sufficient evidence to justify the submission of the issues to the jury.

6. In this connection it is urged by appellant that the cause was essentially a suit in equity rather than an action at law, but we cannot see that this contention was well taken. The action was upon an implied contract to pay over the money in question to the plaintiff when the property should be clear of the liens in question. It was in the nature of an action for money had and received for plaintiff's benefit. It was merely an action against an ordinary stakeholder. If the defendant had kept the money in its hands it might perhaps by a proper pleading have presented to the court the adverse claims to the money of De Vol, by Lambert

and Whitmer, and have had that matter adjudicated; but there was no attempt to present this question. In the condition of the pleadings we think it was purely an action at law and was properly tried before a jury.

7. Under assignments of error 7, 11, 18, 19, 20, 21 and 22, it is contended that the effect of the contract alleged and urged by the plaintiff is to vary the terms of the covenant of warranty in the deed. We do not think this contention can be supported. The arrangement in regard to the holding back of this money had nothing to do with the covenants of warranty but was an independent transaction. The money was kept out and deposited with reference to the particular liens, which were then in litigation. The covenant of warranty was against *all* encumbrances. If this money had been paid over to the plaintiff, the grantee under the deed would still have had his action for any breach of the warranty, whether that breach might result from these particular liens, or any other liens; and whatever disposition might be made of this particular fund, the warranty in the deed would be left entirely undisturbed.

It was not, therefore, an attempt to vary or change the terms of the warranty that was contended for by the plaintiff. It was a contract in regard to this particular fund, which was held out under a special arrangement to provide for the satisfaction or discharge of these particular liens.

8, 9. The defendant asked the court to instruct the jury as follows:

"Plaintiff alleges that he deposited the money with defendant, and defendant denies the same and alleges the money was deposited by Mary De Vol."

And again:

"If you find from a preponderance of the evidence that the money deposited in the bank was the money of Mary De Vol, then plaintiff cannot recover."

By these instructions the defendant sought to have submitted to the jury the question of whether the arrangement as to the money deposited was made by Mary De Vol or the plaintiff, and as to which of them, the money belonged. These instructions were refused by the court, and in this we think there was error. If the money actually belonged to Mary De Vol, and the contract of the bank was to pay it to her and not to plaintiff, of course the plaintiff must fail in this action, as there is no claim of any assignment. The issue was directly made by the pleadings and there was evidence to sustain both contentions.

As we have seen, the evidence of George De Vol and his sister, that he was the real owner of the land and the money, and that the contract was made with him, was entirely competent, yet it was not necessarily conclusive.

The legal title to the property was confessedly in Mary De Vol, and some inference or presumption would naturally arise that the property was hers, and that, therefore, the money also belonged to her. Whether this presumption was overcome by the testimony of George De Vol and his sister was for the jury.

Besides this, the defendant offered and introduced affirmative evidence that the contract and arrangement in regard to this money was with Mary De Vol.

The contract, or receipt for this money, offered by defendant is as follows:

"$950.00. Portland, Oregon, October 31st, 1905.

"Received of Mary De Vol the sum of nine hundred fifty dollars, to be held as security for the payment of the City Liens against lots 1 and 4 block 235 in Couch

Addition to the City of Portland, Multnomah County, Oregon, pending the result of the present litigation.

"The liens are as follows:

For improvements 17th St. lot 1.....	$401.70
For improvements 17th St. lot 4.....	444.03
Total without costs or interest.....	$845.73

"Also, May 24th, 1905, Tanner Creek Sewer:

Lot 1 said block.....	9.80
Lot 4 said block.....	9.80
Total	19.60

"The sums for improvement of 17th Street to be held by us until the said litigation is settled by court or compromised, to bear interest at 4% per annum from date until paid.

"The said $19.60 and interest and costs for said sewer to be paid by us within five days from this date.

"And we further promise to pay the surplus over and above said liens to said Mary De Vol or her order within five days after notification that said 17th Street improvement is adjudicated by the courts or ready for compromise by the parties thereto.

"Citizens Bank.
"By A. W. Lambert, Cash."

Lambert testified as a witness for the defendant that this contract was written out at the time of the transaction, and that one copy of it was then and there given either to Mary or George De Vol. This evidence was amply sufficient to go to the jury as supporting defendant's contention in the case.

The proposition that where the contention of either party is alleged in the pleading, and sustained by evidence sufficient to go to the jury, he has a right to have that theory submitted, is too well settled to merit the citation of authorities. We cannot find that this issue in the case was anywhere distinctly submitted to the jury, and the defendant having asked for specific in-

structions in that regard, and excepted to their refusal, a new trial must be granted.

Another instruction in relation to this matter asked for by the defendant and refused by the court is as follows:

"And in this connection I instruct you that the money deposited in the bank, whatever the sum thereof was, is admitted to have been withheld as a part of the purchase price of the property sold by the De Vols to Whitmer, and I instruct you that the property so sold *was Mary De Vol's property and that said money so deposited was, therefore, Mary De Vol's.*"

For reasons already discussed there was no error in refusing this instruction.

Reversed and remanded for new trial.

REVERSED AND REMANDED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Rehearing denied June 24, 1919.

PETITION FOR REHEARING.

(181 Pac. 985.)

On petition for rehearing. DENIED.

Mr. Ralph R. Duniway and *Mr. George N. Woodley*, for the petition.

Messrs. Malarkey, Seabrook & Dibble, contra.

In Banc.

BENNETT, J.—10. It is urged in the petition for rehearing that Mary De Vol is estopped by her testi-

mony in this case from afterwards commencing a proceeding to recover the money in question in an action on her own behalf, and, therefore, it is reasoned that on this account an estoppel of the *defendant* from making the claim that the money belonged to her is in some way brought about, and that her testimony in regard to the ownership of the money is therefore conclusive upon the defendant.

The learned attorney clearly confuses what might work an estoppel of Mary De Vol, with what would be necessary to create an estoppel on the part of the defendant.

It would be a startling and unusual doctrine if a party in a case could be estopped or concluded by the mere testimony of a witness *offered by the adversary party.*

Much stress is placed upon the opinion of this court in *Gardner* v. *Kinney,* 60 Or. 292 (117 Pac. 971), but upon a careful examination of that case it will clearly appear that it is in no way in point upon the question here presented.

In the Gardner case the plaintiff was an agent of the defendant and claimed to have authority to employ labor and pay the employees. He had employed one Johnson and paid him and was asking to have that claim added to his own. Both the plaintiff and Johnson testified that he looked to plaintiff for his pay. The question was not *taken away from the jury,* as in this case, but was submitted to the jury, and the jury found in favor of the plaintiff upon the issues. It was in relation to such a case and *arguendo* only that the court used the language about estoppel referred to. If the question in this case had been submitted to the jury, and that body had found in favor of the plain-

tiff upon that issue, basing its verdict partly or wholly upon the testimony of Mary De Vol, it may well be that, as said in the Gardner case, she would have been estopped from bringing another suit for the same money; having, by her evidence, caused the defendant to once pay it to George De Vol, but this could in no way work an estoppel *upon the defendant,* as to the defense pleaded and insisted upon *in this action.*

The defendant did not know when it made its defense what would be the claim of Mary De Vol, or what she would testify to; and having made that defense, and offered ample evidence to support it, it had the right to have the question submitted to the jury, and the court had no right to say that her evidence was conclusively true, or to disregard the evidence to the contrary offered by the defendant.

It may be unfortunate, as contended by respondent, that the case should be reversed upon this ground. But for this the defendant is not to blame. The respondent had it in his own hands to have the question properly submitted to the jury at the first trial and passed upon and decided. Apparently he opposed this being done, or at least he did not specifically consent to its being done. If he had joined with the defendant in asking to have this issue submitted to the jury, the court would have submitted it. Plaintiff is not now in a position to complain because the case has to be sent back, so that the question can be properly and regularly submitted.

REVERSED AND REMANDED. REHEARING DENIED.

Submitted on brief June 4, modified June 24, 1919.

RAILSBACK *v.* RAILSBACK.*

(182 Pac. 131.)

Pleading—Complaint—Sufficiency—Question Raised on Appeal.

1. Where defendant did not demur to a complaint in divorce, but went to trial upon a simple denial that accusations of infidelity were made, the complaint must be held sufficient as against objection urged upon appeal that it does not allege that the accusations were made by defendant with intent to wound plaintiff's feelings.

Divorce—Cruel and Inhuman Treatment—Evidence—Sufficiency.

2. In divorce suit by the husband, evidence of defendant's jealousy and cruel and inhuman treatment, consisting in part of false accusations of plaintiff's infidelity, *held* sufficient to justify a decree for plaintiff.

[As to definition of cruelty in divorce action, see note in 65 Am. St. Rep. 69.]

Divorce—Settlement of Property Rights—Repayment of Money Used by Plaintiff Husband.

3. Where a divorce is granted to the plaintiff husband, and it appears from the testimony that shortly after their marriage the defendant wife received $3,000, at least a part of which was spent in assisting the plaintiff in business, although defendant's acts probably prevented plaintiff from earning as much money as he otherwise would, he should be required to make such payment to her as would be an equitable squaring of the account.

From Multnomah: WILLIAM N. GATENS, Judge.

In Banc.

This was a suit for divorce. The complaint alleged that plaintiff had ever been mindful of his marriage vows, and had treated defendant as a wife in her station in life should be treated; that defendant had heaped upon him personal indignities, which are specified as being extremely jealous and insisting that plaintiff was associating with and committing adultery with numerous women; that plaintiff is a life insurance solicitor, and she insisted that it was neces-

*The question as to whether making charges of adultery is ground for divorce is discussed in notes in 18 L. R. A. (N. S.) 300 and 34 L. R. A. (N. S.) 360. REPORTER.

sary for her to accompany him, while he was soliciting insurance, in order—as she claimed—to keep plaintiff from flirting and committing adultery with various women. The particular specifications as to her accusations of lewd conduct and cruel treatment, are set forth in detail and distinguished by the letters of the alphabet, beginning with "a" and ending with "m," and need not be recited in detail. They include accusations of adultery, made to his friends and employers, causing him to lose employment; charges that he pointed a gun at her, thereby causing her to have a miscarriage; interfering in his business in such a way that his employees deserted him and refused to work with him or for him; threatening to emasculate him, and generally and continually nagging him, swearing at him and using abusive epithets to him.

The answer denies all these charges and alleges that defendant, upon her marriage, had $3,000, which plaintiff has used and which he refuses to repay; that plaintiff is a flirt and has always annoyed and embarrassed defendant by reason of his conduct with other women, and that she is very much in love with plaintiff and asks that the suit be dismissed. MODIFIED.

For appellant there was a brief submitted over the name of *Messrs. Nolan & King.*

For respondent there was a brief submitted over the name of *Messrs. Davis & Farrell.*

McBRIDE, C. J.—1, 2. It is urged that the complaint is defective in that it does not allege that the accusations made by defendant were made with the intent to wound his feelings, but the defendant did not demur, but went to trial upon a simple denial that the accusations were made. Under the circumstances we

think the complaint is sufficient. The evidence shows that she had repeatedly accused him of lewd conduct with various women, and there is not a particle of testimony outside of her own surmises to indicate that these accusations are true. In fact, the testimony indicates that in spite of continual jealousy, outbursts of rage, and defamation, plaintiff bore with defendant's conduct patiently until it appeared impossible for him to conduct his business and live with her. She is evidently of a nervous disposition and easily moved to jealousy, and when in these moods disposed to be reckless and violent in her language. How far her conduct was influenced by imaginary "spiritual" communications, in regard to her husband's infidelity, cannot be known, but it is probable that the mythical "dark woman" in the spirit land who, as she told one witness, had informed her that her husband was "always running after other women," had something to do with exciting her jealousy. It is difficult to see how any spirit, light or dark, could have instigated her to tell one of her friends, as she did, that her husband had pointed a gun at her and thereby caused her to miscarry, when nothing of the kind happened. It is obvious that no man could live with her happily, or indeed at all, and keep his senses. While we sympathize with her unhappy temperament, we do not feel justified in compelling plaintiff to endure the consequences of it.

3. There is one thing however we think, in justice, plaintiff ought to do, and that is to make good the money which defendant brought to the marriage. We think the court had a right under the pleadings to require the plaintiff to pay the defendant $150, but it appears from the testimony that he received $3,000

shortly after the marriage, and at least a part of it was spent in assisting plaintiff in business. While defendant's statements are not entirely reliable, as to what was spent by her for her own purposes and what was used to assist her husband, and while it is true her conduct has probably prevented him from earning as much money as he otherwise would, yet we think a repayment to her of $650 would be an equitable squaring of the account.

The decree will, therefore, be modified so as to require plaintiff to pay to the defendant $150 on or before September 1, 1919, and $100 on September 1st of each of the following years until the sum of $650 shall have been paid in full. In all other respects the decree of the Circuit Court is affirmed. Neither party will recover costs. MODIFIED.

Argued April 17, reversed and remanded June 24, 1919.

CHURCHILL *v.* MEADE.*

(182 Pac. 368.)

(See, also, 88 Or. 120 (171 Pac. 565).

Action—Equitable Defenses in Action at Law.

1. Section 390, L. O. L., as amended by act of February 13, 1917, providing that defendant in law action who is entitled to equitable relief "may set such matter up by answer," does not compel litigant to interpose equitable defenses in law action, but permits him to try out defenses at law, and, if unsuccessful, urge grounds for equitable relief by proper suit.

Reformation of Instruments—Nature of Remedy—"Reformation."

2. "Reformation" contemplates a continuance of the contractual relations upon what both parties really intended should be the stipulation.

[As to instruments subject to "reformation," see note in 65 Am. St. Rep. 505.]

Pleading—Hypothetical Allegations.

3. An averment that a party would not have done a hypothetical act presents no issuable matter; for it cannot be proved or refuted.

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*For authorities passing on the question of relief from purchase on ground of mistake, see note in 34 **L. R. A. (N. S.)** 927. REPORTER.

Pleading—Allegations—Conclusion—"Facts."

4. In action to set aside decree confirming execution sale upon ground of mistake, allegation that plaintiffs would not have bid so much if they had calculated correctly *held* a conclusion, and not statement of fact; "facts" being actualities and what have taken place, and not what might or might not have taken place.

Equity—Maxims.

5. Equity ministers to the diligent, and not to the negligent.

Courts—Records—Correction—In Term.

6. During the term the record of the court's proceedings is in the bosom of the court and subject to correction.

Execution—Setting Aside Confirmation of Sale.

7. Decree confirming execution sale will not be set aside after term at which it was entered except through an original suit to set it aside based upon some equitable ground for relief.

Execution—Setting Aside Confirmation of Sale—Mistake.

8. In view of Section 756, L. O. L., equity will not set aside decree confirming execution sale merely because judgment creditor purchased property for a sum in excess of balance due on judgment, and in excess of value of property, as result of miscalculation as to balance due on judgment.

From Tillamook: GEORGE R. BAGLEY, Judge.

Department 1.

By suit in the Circuit Court of Tillamook County the plaintiff Churchill as the assignee of his coplaintiff foreclosed a mortgage against the defendants herein, upon real property and chattels in that county and upon realty in Multnomah County. Execution was issued on the decree and the Tillamook land was sold as the complaint here alleges, for $15,000, its full value. The chattel property also was sold and its proceeds were applied to the partial satisfaction of the decree. Another execution was issued to the sheriff of Multnomah County for the satisfaction of the unpaid balance and on October 16, 1916, at an adjourned sale for want of bidders at the advertised date, the property was struck off to the plaintiff Churchill for $3,110. No bids were received at the sheriff's sale except that of Churchill.

It is stated in the complaint, in substance, that the intention of Churchill for himself and his coplaintiff was that the amount to be bid for the Portland property was the balance remaining unpaid on the decree and that the intention was that the amounts bid should be paid only by having the same applied on the judgment. It is averred that the Portland realty was worth not more than $1,550 and neither of the plaintiffs would have been willing to take either of the tracts in Portland for that amount, but bid more than the property was worth, so that if redemption were made the plaintiffs would have the benefit thereof, to the end that the decree should be entirely satisfied. They say that:

"In fixing the amounts to be bid for said property plaintiffs had a calculation made of the balance still unpaid on said judgment, and according to the said calculation, there remained at the time of sale of the Portland property, a balance unpaid upon said judgment of $3,588.25."

They aver that they relied upon the calculation, believing it to be correct, and acting thereon and not otherwise, made the bid as stated, intending that the amount thereof should be paid only by giving credit therefor on the balance of the judgment. They say that they would not have made the bid if it had required the payment of any money. They further allege:

"That in the calculation aforesaid, a mistake occurred in that by oversight and inadvertence, interest for one year upon the principal amount named in the judgment was added and in consequence thereof, the total amount calculated as accrued upon said judgment was $1,012.50 greater than the true amount accrued; that plaintiffs had no knowledge or information that said mistake had been made and did not discover said error until on or about July 10, 1918."

The sales were confirmed by the Tillamook court about November 20, 1916, without detection of the mistake then or by anyone until about July 10, 1918, when one of the attorneys for the defendants for the first time discovered that a correct calculation of the amount accrued upon the judgment showed that it had been overpaid by the bid and that upon the face of the record the plaintiffs had received from the sheriff upwards of $700 more than the amount of the judgment when the amount due was computed correctly. The plaintiffs plead several offers to the defendants to adjust the matter by giving them credit on the judgment for the amount of the excess and otherwise, declare that no income has been received by the plaintiffs for the Portland property, that no sheriff's deed has been issued and that the sheriff's certificate has been assigned to the plaintiff Beals.

The complaint alleges that the defendants are demanding payment from the plaintiffs of the amount overpaid and that the defendant Minnie Meade has brought an action against Churchill in the Circuit Court of Multnomah County, to recover the surplus, claimed by her to be $774.95, well knowing that the apparent balance is the result of the mistake already mentioned. This pleading further avers:

"That the aforesaid mistake was not caused by the gross negligence on the part of the plaintiffs, in that said calculation was made at a time when the sheriff's returns of sales on chattel mortgages had not been filed and the exact amount to be credited on said judgment on account thereof had not been determined, and by reason of the fact that said sales were made at different times and required several calculations as to amount of interest accrued to the dates when the credits were to be given, and by reason of said complications, confusion crept into the calculations being made and by the aforesaid inadvertence, mistake and

oversight, interest for one year and a portion of another year was included, when only interest for a portion of the year should have been included."

The plaintiffs express a willingness that the sale and confirmation be set aside, the proceedings connected therewith canceled and a resale of the property made, or to set aside the judgment allowing the sale to stand and to transfer the property to the defendants on the terms offered to them, or to have such other disposition made of the transaction as the court may deem equitable. Claiming to have no plain, speedy or adequate remedy at law, they pray that the confirmation be set aside and that the defendants be enjoined from prosecuting any action against the plaintiffs for the apparent excess of the bid over the amount of the judgment.

The defendants interposed a demurrer to the complaint on the following grounds:

"First. The complaint shows that the court has no jurisdiction of the persons of the defendants, or of the subject matter.

"Second. The complaint shows that there is another action at law pending in Multnomah County, Oregon, between the real parties at interest herein, for the same cause, arising out of the same state of facts, wherein the relief sought herein if just, could be obtained by a cross-bill in equity, in the manner provided by the Code, and that said action was pending at the time the complaint herein was filed.

"Third. There is a defect of parties plaintiff, in that plaintiff F. R. Beals is a stranger in this action, as shown by the allegations of the complaint, plaintiff Churchill being alone the party at interest under the pleadings.

"Fourth. That several causes of suit have been improperly united, to-wit: a suit to vacate a final judgment of this court, and a suit asking equitable relief

against a law action pending between the parties in Multnomah County, Oregon.

"Fifth. Because the complaint does not state facts sufficient to constitute a cause of suit against the defendants, or either of them."

The Circuit Court overruled the demurrer and the defendants having declined to plead further, a decree was rendered setting aside the sale and confirmation and enjoining the prosecution of the action at law. The defendants appealed.

REVERSED AND REMANDED.

For appellants there was a brief over the name of *Messrs. Johnson & Handley,* with an oral argument by *Mr. Tom B. Handley.*

For respondents there was a brief and an oral argument by *Mr. H. T. Botts.*

BURNETT, J.—The defendants contend that the plaintiffs have a full and adequate remedy for the matters alleged in their complaint in the action at law pending in Multnomah County. They rely upon Section 390, L. O. L., as amended by the act of February 13, 1917 (Laws 1917, p. 126), reading as follows:

"Bills of revivor and bills of review, of whatever nature, exceptions for insufficiency, impertinence, or irrelevancy, and cross bills are abolished; but a decree in equity may be impeached and set aside, suspended, avoided, or carried into execution by an original suit; and in an action at law where the defendant is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material to his defense, he may set such matter up by answer, without the necessity of filing a complaint on the equity side of the court; and the plaintiff may, by reply, set up equitable matter, not inconsistent with the complaint and constituting a defense to new matter in the

answer. Said reply may be filed to an answer containing either legal or equitable defenses. The parties shall have the same rights in such case as if an original bill embodying the defense or seeking the relief prayed for in such answer or reply had been filed. Equitable relief respecting the subject matter of the suit may thus be obtained by answer, and equitable defenses to new matter contained in the answer may thus be asserted by reply. When such an equitable matter is interposed, the proceedings at law shall be stayed and the case shall thereafter proceed until the determination of the issues thus raised as a suit in equity by which the proceedings at law may be perpetually enjoined or allowed to proceed in accordance with the final decree; or such equitable relief as is proper may be given to either party. If, after determining the equities, as interposed by answer or reply, the case is allowed to proceed at law, the pleadings containing the equitable matter shall be considered withdrawn from the case, and the court shall allow such pleadings in the law action as are now provided for in actions of law. No cause shall be dismissed for having been brought on the wrong side of the court. The plaintiff shall have a right to amend his pleadings to obviate any objection on that account. Testimony taken before the amendment and relevant to the issue in the law actions shall stand with like effect as if the pleadings had been originally in the amended form. *Provided,* nothing in this amendment shall operate so as to affect suits or actions pending at the time the same goes into effect."

1. It will be noted that the language of the new enactment is permissive and not mandatory. It allows but does not compel the litigant to interpose in the action at law equitable defenses. This construction is apparent when we read that when the equitable matter is interposed the case shall proceed as a suit in equity until the equitable issues are determined. The effect of this statute is not to change the opera-

tion of the old rule giving a party an election to try out his defenses at law and, if unsuccessful, to urge his grounds for equitable relief by a proper suit. It may be said by a figure of speech that the statute opens a new door into chancery through the law courts, whereas before, the entry must have been by a direct suit in that forum. As before, it is a matter of election with the litigant whether he shall initiate his equitable defense in the law action or by an original suit. The plaintiff might make his legal defense under *Burbank* v. *Dodd,* 4 Pac. 303, not found in the Oregon reports, which decides that only the sheriff can recover an unpaid bid made at a sheriff's sale.

If well grounded, the right to bring this suit would exist independent of whether the action at law in Multnomah County had been instituted or not. The essence of the matter is contained in the question of whether the decree of confirmation, adjudicating, as it does, all the questions which might be raised against confirming the sale, may be set aside because the purchaser discovers that he paid more for the property than he intended. The instant suit is a direct attack upon the decree of confirmation. Unless successfully assailed, the decree is conclusive between the parties and their representatives and successors in interest by title subsequent to the commencement of the action: Section 756, L. O. L.

The cases cited by the defendants, *Mathews* v. *Eddy,* 4 Or. 225, *Dolph* v. *Barney,* 5 Or. 191, and *Wright* v. *Young,* 6 Or. 87, were all of them instances where a confirmation of sale was upheld as against a collateral attack. In *McRae* v. *Daviner,* 8 Or. 63, there was no attempt to show any equitable ground for relief and it was held that the confirmation was a conclusive adjudication. In *Leinenweber* v. *Brown,* 24 Or. 548 (34

Pac. 475, 38 Pac. 4), the plaintiff showed no excuse for not urging against the confirmation the very objections presented in the complaint. *Farmers' Loan Co.* v. *Oregon-Pacific R. R. Co.,* 28 Or. 44, 70 (40 Pac. 1089), was a case where there was an appeal directly from the order of confirmation, and *Balfour* v. *Burnett,* 28 Or. 72 (41 Pac. 1), was a similar case of appeal from the confirmation.

The defendants urge that the mistake must be mutual in order to justify the court in setting aside the decree of confirmation, but a distinction is to be made between the reformation and the rescission of a contract. For instance, in *Mitchell* v. *Holman,* 30 Or. 280 (47 Pac. 616), it is said:

"While a mistake of one party to an agreement may in some instances be ground for the rescission of the contract, or afford a sufficient reason for a refusal by a court to enforce specific performance thereof, it clearly will furnish no ground for reforming it."

2. Almost without exception the cases relied upon by the defendants are instances where it is sought to reform and not to rescind a contract. Reformation contemplates a continuance of the contractual relation upon what both parties really intended should be the stipulation. Rescission, however, proceeds upon the ground that on account of the mistake of one of the parties his mind in very truth did not assent to the contract as written. In other words, there was in fact no meeting of minds, which leads logically to a rescission or ending of the pseudocontractual relation.

In *Hughey* v. *Smith,* 65 Or. 323 (133 Pac. 68), Mr. Justice MOORE laid down the rule thus:

"The declaration that except for the mutual mistake referred to, Hughey and his wife would not have executed the lease to Smith, is not an allegation of any material fact, but rather the statement of a conclu-

sion of law sought to be deduced from the preceding averments, and insufficient for any purpose": Citing *Hyland* v. *Hyland,* 19 Or. 51, 57 (23 Pac. 811).

Hughey v. *Smith,* 65 Or. 323 (133 Pac. 68), was a suit to cancel a contract for the leasing of some land. The Hugheys had leased their property to Smith, to commence April 1, 1912. It turned out that their previous lease to one Borba would not expire until a year later. Smith brought an action for damages and the Hugheys responded by a cross-bill in equity to cancel the contract. Their averment was:

"That at the time of the execution of the lease to the defendant herein, the said James Hughey and Myra Hughey and Hiram W. Smith were of the opinion that the said lease to the said Borba would expire on the 1st day of April, 1912. That the said Myra Hughey, at the time of the execution of said lease to the defendant, was in failing health and memory, and the defendant well knew the same, and the said James Hughey was and is a man of limited education, and was and is unable to read or write, all of which was and is well known to the defendant herein, and that by reason thereof they were each laboring under a mutual mistake and a misapprehension of fact, and said lease to defendant was made and entered into under a mutual misapprehension and mutual mistake of fact. That except for said mutual misapprehension and said mutual mistake of fact the plaintiff James Hughey, nor his wife, * * now deceased, would have made and entered into said lease."

The opinion of Mr. Justice MOORE points out that the ill health of the one and the illiteracy of the other of the plaintiffs were not sufficient to prevent them from comprehending the terms of the contract and that it does not necessarily follow that they would not have made it, so that their statement in that respect was a mere conclusion. In a characteristic homily on

the subject of pleading, Mr. Chief Justice THAYER, delivering judgment in *Hyland* v. *Hyland*, 19 Or. 51 (23 Pac. 811), said:

"Attorneys who prepare complaints to reform written instruments are too apt to state conclusions instead of facts. They should set out the transaction as it occurred and not the legal effect thereof. The complaint in this case should have stated what the parties mutually agreed to do in regard to the exchange of their lands, and not the result of what they did do. * * If the complaint had lacked some material allegation, the defect would be fatal and could be taken advantage of without interposing a demurrer; but where the defect consists in alleging evidence of facts, or conclusions of facts instead of the facts themselves, it will be waived unless a demurrer is taken to the pleading."

3, 4. In the Hyland case the court was treating of conclusions of facts and not of any deduction to be drawn as a matter of law from any alleged state of facts. In the instant case it is enough to say that any pleading except a denial or a demurrer must contain statements of facts. Facts are actualities. They are what took place, not what might or might not have happened. Things that have in very truth occurred are usually capable of proof. Conjecture is as far as we can go in respect to what might have been but was not. An averment that a party would not have done a hypothetical act presents no issuable matter, for it cannot be proved or refuted. The result is that when the plaintiffs say they would not have bid so much if they had calculated correctly, they are drawing their own inference. Whether it be a conclusion of fact or one of law, it is nevertheless a conclusion which as a matter of pleading does not aid the complaint.

5. In this instance, the plaintiffs say that they had a calculation made. It is not disclosed by the com-

plaint what factors entered into the calculation and how the plaintiffs were induced to add an extra year's interest. Certainly nothing is stated except the bare fact that they made a mistake. No excuse is given for such an error. It happened without anything to induce it. Equity ministers to the diligent and not to the negligent, and we have often held that if the error could have been avoided by a reasonable attention to one's own affairs, one cannot expect relief in chancery.

Campbell v. *Parker,* 59 N. J. Eq. 344 (45 Atl. 116), was a case where a purchaser made a bid at a receiver's sale, advanced 10 per cent of his bid and filed a written memorandum of his purchase for the full amount. After the property was struck off to him and before signing the bid, he inquired from the receiver whether the land was free from encumbrance and was told by the receiver, "Yes, as I understand it." In a proceeding at the suit of the receiver to compel the bidder to show cause why he should not comply with his offer, the court held that the doctrine of *caveat emptor* applies to such sales and that the bidder contracts at his peril.

In *Hayes* v. *Stiger,* 29 N. J. Eq. 196, the purchaser at a foreclosure sale based on a junior mortgage bought without reference to the record fact that there was a senior mortgage upon the land and an inchoate right of dower. The court held that:

"As the case stands, the highest equity he can claim is, that he has not made as good a bargain as he expected to make. This can hardly be estimated an equity sufficient to sustain the abrogation of a contract."

Similar cases from New Jersey are *Twining* v. *Neil,* 38 N. J. Eq. 470; *Sullivan* v. *Jennings,* 44 N. J. Eq. 11

(14 Atl. 104), and *Boorum* v. *Tucker,* 51 N. J. Eq. 135 (26 Atl. 456).

In *Farm Land Mortgage & Debenture Co.* v. *Hopkins,* 63 Kan. 678 (66 Pac. 1015), the plaintiff foreclosed its senior mortgage, obtaining a decree for $2,150. At the same time there was a decree against the mortgagors on a junior encumbrance for $654.30. An attorney for the plaintiff who, however, had not conducted the proceedings up to the time of sale, attended the sale and having inquired from the deputy sheriff the amount of the judgment held by the company and having stated that he desired to bid that amount for the company, was informed that the company's decree amounted to $2,838.05, being the sum of both decrees with interest, instead of only the company's decree. In an action by the sheriff to recover the amount of the bid, the company pleaded the conduct of the sheriff as estoppel. The court, after discussing the matter, said:

"Here there was no design by the sheriff to deceive, and there was no obligation resting upon legal duty to obtain and give information to the company. A mistake of fact was made, it was true; but, before equitable relief can be afforded, it must appear that the fact was not only not known to the party, but that it was one which he could not by reasonable diligence have ascertained. Negligence often weakens a claim for equitable relief, and the general rule is that where a party neglects to avail himself of the means of information and to ascertain facts upon which his claim is based, where it is as much his duty as that of the party with whom he deals to know the facts, equity will not relieve against his own negligence."

That case was one much stronger for relief than is the present instance. There the sheriff, without design to defraud it is true, misrepresented the amount due on the decree, but the court held that the data

for ascertaining the amount was of record and equally within the reach of the plaintiff company, so that it was through its own negligence that it did not know the truth. Here no misrepresentation of the amount due upon the decree is imputed to anyone, certainly not to the defendants. No reason is assigned why the mistake was made in computing the amount. It is not indicated that any factor of the problem was concealed or that the plaintiff was misled in any respect. Several cases are cited by the plaintiffs where bids on public works were allowed to be withdrawn on account of mistakes made in computing the bids. But in each instance there was some ground or reason for the mistake. For example, in *Board of School Commissioners* v. *Bender,* 36 Ill. App. 164 (72 N. E. 154), the bidder did not receive sufficient notice of the letting of the contract, so that he was very much hurried in making up his estimate and in his haste turned two leaves of his estimate-book, with the result that his bid was made very much lower than he had actually computed, and he would suffer great loss if the bid was enforced. He promptly notified the authorities before the contract was let, and it was awarded to the next lowest bidder, so that equity relieved him of the forfeiture of his deposit.

In *City of Omaha* v. *Venner,* 243 Fed. 107 (155 C. C. A. 637), the defendant bid on an issue of municipal bonds, expecting to sell them again at a profit in New York for savings bank security. The language of the advertising circular under which he made his bid was uncertain as to whether the taxable property of the city was counted at its full value or only 20 per cent thereof as a basis of security for the bonds. Finding that he could not resell in New York on account of statutory restrictions requiring full value of

taxable property for such purposes, he was relieved from his bid on account of the uncertainty of the advertisement.

The case of *Interstate Bank* v. *O'Dwyer,* 15 Tex. Civ. App. 33 (38 S. W. 368), was an instance where the court directed the sale of the personal and real property of a corporation in the hands of a receiver and provided that on receipt of $5,000 in cash the remainder of the price might be paid in approved claims against the corporation. At the time the order was made the receiver stated in open court that $5,000 would pay all claims entitled to preference over that of the purchaser. Under these circumstances the purchaser bid a certain price, thinking to apply his own claim in satisfaction of his bid. It happened, however, that there were claims having preference over his largely in excess of $5,000. Owing to this misunderstanding he was relieved from his bid.

6. *Anschuttz* v. *Steinwand,* 97 Kan. 89 (154 Pac. 252), was a case where the plaintiff's attorney had instructions from his client to bid $300 for a certain tract, subject to a prior mortgage for $1,100. The attorney telegraphed the sheriff, authorizing a bid of $300 "over the first mortgage," instead of "subject to the first mortgage." The application to set aside the decree of confirmation was made at the same term at which it was rendered and the court granted the relief desired. This conclusion must be justified on the ground that during the term the record of the court's proceedings was in the bosom of the court and subject to correction.

7, 8. The present instance is one where on the motion of the plaintiff in the writ the decree of confirmation was entered and the matter passed beyond the jurisdiction of the court, except through an original

suit to set the decree aside. This must proceed upon some equitable ground for relief and not upon the heedlessness or mere oversight of the plaintiffs not influenced by some reasonable excuse. There must be something more than a spontaneous vagary of the mind. The excuse must rest upon some external circumstance calculated, although without complete justification, to induce the mental process resulting in the mistake from which the one in error seeks to be relieved. The purchaser attended the sale, warned by the law that the buyer must beware. The object of the sale was to bring as much for the property as could be obtained and if, by his own inadvertence, uninfluenced by any other cause, he has paid too dearly for the property, he is beyond the pale of equity and cannot be relieved. A contrary ruling would imperil the permanence and conclusiveness of judgments and decrees as declared in Section 756, L. O. L.

The demurrer to the complaint ought to have been sustained. The decree of the Circuit Court is reversed and the cause remanded for further proceedings, but without costs or disbursements for either party in this court. REVERSED AND REMANDED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Motion to dismiss appeal submitted October 24, overruled November 26, petition for rehearing filed December 16, 1918, denied February 25, 1919.

Argued on the merits June 6, reversed June 24, 1919.

WADE *v.* WADE.

(176 Pac. 192; 178 Pac. 799; 182 Pac. 136.)

ON MOTION TO DISMISS.

Judgment—Vacating Judgment—Authority of Court—Time of Vacation.

1. Superior Courts possess authority to vacate void judgments at any time.

Divorce—Vacating Judgment—Authority of Court—Time of Vacation.

2. Where wife sued for divorce on published summons, and affidavit of mailing erroneously and inadvertently showed mailing only 10 days before the day for answer, when in fact it was 40 days before such day, default decree against the husband was void and could be vacated, although several terms had elapsed since its rendition.

Divorce—Decree—Amendment of Record.

3. Where wife sued for divorce on published summons, and affidavit of mailing erroneously and inadvertently showed mailing only 10 days before the day for answer, when in fact it was 40 days before such day, default decree against the husband was validated by a subsequent order *nunc pro tunc* for the amendment of the affidavit to show the true date of service.

Process—Amendment of Return—Nunc Pro Tunc.

4. It being the service and not the return which authorized a default judgment, an order *nunc pro tunc* for the amendment of a return erroneously giving the date of the service of summons relates back to the date of the original summons.

Motions—Vacating Order—Subsequent Term.

5. Where the court corrected *nunc pro tunc* an inadvertently erroneous return of published notice and so validated the default decree, it was without power to vacate it at a term subsequent to that in which the order was made.

Appeal and Error—Appealable Orders—Opening Default.

6. An order in a suit for divorce at a term subsequent to the judgment by default opening the default is appealable by the defaulting husband, since it affects a substantial right and changes his status from that of a single to that of a married man.

ON THE MERITS.

Divorce—Service by Publication—Amendment Nunc Pro Tunc of Proof of Service.

7. Where it appeared, after default divorce decree had been rendered on published summons, that affidavit of mailing erroneously

showed mailing only 10 days before answer, whereas, in fact, mailing had taken place 40 days prior thereto, court had jurisdiction to amend proof of service *nunc pro tunc*.

[As to service by publication, see note in 61 Am. St. Rep. 494.]

From Multnomah: JOHN P. KAVANAUGH, Judge.

In Banc.

This is a motion to dismiss an appeal and is based upon the following facts: On September 30, 1915, plaintiff filed in the Circuit Court for Multnomah County a complaint for divorce, and on the twenty-fourth day of November upon an affidavit duly setting forth all the necessary jurisdictional facts, obtained an order authorizing service of publication of summons upon the defendant and directing that a copy of the complaint and published summons be forthwith deposited in the postoffice at Portland, Oregon, directed to defendant at his last-known postoffice address, the same being Boise, Idaho, which summons together with a copy of the complaint was duly mailed on November 29, 1915, but by inadvertence the affidavit of mailing was made to read "December 30" instead of November 29th. The summons was duly published as provided in the order, the day for answer being fixed for January 10, 1916. On June 23, 1917, the plaintiff obtained a default decree against defendant. On April 4, 1918, plaintiff having discovered the mistake in the affidavit showing the mailing of the summons to defendant, asked leave to correct the affidavit *nunc pro tunc* in accordance with the facts, which motion was allowed, and the correction made by permitting the affidavit to be entered and filed as of June 15, 1917. On May 20, 1918, plaintiff applied for and obtained an order of the court vacating and setting aside the decree of divorce rendered on June 23, 1915, on the ground that it was void and of

no effect, and setting aside the order allowing the amendment to the proof of mailing and directing that an alias summons issue, as provided by law. From this order defendant appeals.

Plaintiff moves to dismiss the appeal, specifying four reasons for dismissal, as follows:

"First: That the order appealed from is not an appealable order, in that the order made by his Hon. J. P. Kavanaugh on May 20, 1918, was an order to vacate a void decree.

"Second: For the reason that the order appealed from is not a decree within the purview of Section 548, L. O. L., and by reasons thereof is not appealable.

"Third: That the order vacating the void decree was not a final order in that it permitted the filing of an amended complaint and directed Alias Summons to issue.

"Fourth: That until after service was made on appellant under the Alias Summons provided in said order appealed from, defendant and appellant was in default and not entitled to an appeal from the orders or decrees of the court."

MOTION OVERRULED.

Mr. G. Evert Baker, for the motion.

Messrs. Cochran & Everhard, contra.

McBRIDE, C. J.—1-3. The situation disclosed by the record is somewhat out of the usual order in that the respondent seeks to show and must show that the decree rendered in her favor on June 23d, and the order of the court made May 20, 1917, were absolutely void, in order to sustain this motion. Superior Courts possess the undoubted authority to vacate void judgments at any time: *Jones* v. *Jones*, 59 Or. 308, 313 (117 Pac. 414); *Deering* v. *Quivey*, 26 Or. 556 (38 Pac. 710). The decree entered on June 23, 1917, was, upon the

face of the record, invalid and void because the record as it then stood did not show a compliance with the order directing a copy of the summons and complaint to be forthwith mailed to the defendant at his last known place of residence, and unless the amendment to the return gave it validity it was still ineffectual for any purpose, and the court had the authority to set it aside, notwithstanding the fact that several terms had elapsed since its rendition. We are of the opinion the court had authority to allow the amendment to the return and that upon the making of the order the decree became valid *ab initio* between the parties, and all others having actual or constructive notice of the litigation. The general rule is thus stated by Mr. Freeman:

"A very important part of the judgment roll is that containing evidence of the service of process, or the taking of such other steps as are necessary to give the court jurisdiction over the person of the defendant; and it may happen that this part has been omitted from the roll, or has never been filed in court at all, or as filed and incorporated in the roll, is defective, and not sufficient to sustain the jurisdiction of the court, when attacked on appeal, or by motion to set it aside, or even when assailed in a collateral action or proceeding. Then the question arises whether the omission may be supplied, or the error corrected; and if so, by what means. As a general rule, an officer who has made a return of process will be permitted to amend such return at any time. If the return upon the summons or other writ designed to give the court jurisdiction over the person of the defendant, is omitted or incorrectly made, but the facts really existed which were required to give the court jurisdiction, the weight of authority at the present time permits the officer to correct or supply his return until it states the truth, though by such correction a judgment apparently void is made valid. Though the

proof of the service of process does not consist of the return of an officer, the like rule prevails. Thus if a summons has been published in the manner required by law, but the proof of publication found in the files of the court is defective, the court may, on the fact of due publication being shown, permit an affidavit to be filed showing the facts, and when so filed it will support the judgment as if filed before its entry."

1 Freeman on Judgments (4 ed.), § 89-b; *Hefflin* v. *McMinn,* 2 Stew. (Ala.) 492 (20 Am. Dec. 58); *Kirkwood* v. *Reedy,* 10 Kan. 453; *Shenandoah Val. R. R. Co.* v. *Ashby's Trustees,* 86 Va. 232 (9 S. E. 1003, 19 Am. St. Rep. 898); *Estate of Newman,* 75 Cal. 213 (16 Pac. 887, 7 Am. St. Rep. 146).

4. The reason why such an amendment relates back to the original service and validates the decree already rendered is that it is not the return but the fact of actual service that gives the court jurisdiction, the return being merely the evidence by which the court is informed that service has been made upon the defendant: 21 R. C. L., p. 1331, § 79, and cases there cited. While some courts hold that an amendment of process after judgment can only be made upon notice, we think the better reason and authority at least justify the contrary view: *Woodard* v. *Brown,* 119 Cal. 283 (51 Pac. 2, 542, 63 Am. St. Rep. 108); *Kahm* v. *Mercantile Town Mut. Ins. Co.,* 228 Mo. 585 (128 S. W. 995, 137 Am. St. Rep. 665).

Mr. Freeman, in his work on Executions (p. 358, 3 ed.), criticises the practice of the courts in allowing *ex parte* amendment of process, but concedes that such amendments are not void. This question was thoroughly considered in *Rickards* v. *Ladd,* 6 Sawy. 40 (Fed. Cas. No. 11,804), a case arising in this state in the United States District Court. The circumstances were not substantially different from the case at bar

and the opinion bears the mark of painstaking examination of the authorities, as do all the opinions rendered by Judge DEADY. In discussing the question of the right of defendant to notice of the motion to amend, he says:

"And, first, this is not a jurisdictional matter. The jurisdiction of the court depends upon the service of the process. The proof of the fact, the return, is made by the officer making the service, in obedience to the command of the writ under such regulations as the law may prescribe. The court cannot say what return shall be made, but when made, it becomes a part of the record of the court. The defendant is not a party to the proceeding, and it is made without his consent or notice to him.

"If afterwards it is discovered that a mistake has been made in the matter, the return, being now a record of the court, can only be amended by leave of the court. But still the court does not make the amendment. The authority to amend the return, as in the case of making it, is primarily in the officer, and not in the court; but after making the return, the authority of the officer becomes qualified so that it cannot be exercised without the consent of the court. Strictly speaking, then, the proceeding is one between the officer and the court. It is *ex parte* in its very nature, and no one has an absolute right to notice of it. In contemplation of law the amended return is made under the same sanction and responsibility as the mistaken one. In effect, it becomes the return in the case, and cannot be questioned collaterally by the parties to the action or those claiming under them as privies."

5. The case last referred to presented features which might suggest a more rigid rule against upholding the validity of an amendment than the case at bar. In that case the amendment was procured by the plaintiff and it was the defendant who called it in question. Here the plaintiff pursuing a course that she then believed was in her own interest, asked and

received permission to amend the return and thereafter applied to the court to set aside the order which she had so obtained. As between her and her husband the amendment was perfectly valid. As to other parties we are not called upon to express an opinion further than to say that any party dealing with the property involved in the divorce suit, and with that staring him in the face, would not appear to be in a very good position to plead that he was an innocent purchaser in good faith and without notice. It being settled that the amendment was valid, it requires no discussion to determine that the court had no power to vacate the decree in favor of plaintiff or to set aside the order permitting the amended proof of service after the expiration of the term at which such order was made: *Deering* v. *Quivey,* 26 Or. 556 (38 Pac. 710).

6. The order appealed from is clearly appealable. It affected a substantial right and changed the status of the defendant from that of a single man to that of a married man. His case had been tried and passed to a final decree and he was not required to go through the useless ceremony of retrying it upon an amended complaint, the filing of which the court had no jurisdiction to authorize, before he could appeal.

The other questions raised are merely variations of these already considered and need not be separately discussed.

The motion to dismiss is overruled.

OVERRULED.

Rehearing denied February 25, 1919.

PETITION FOR REHEARING.

(178 Pac. 799.)

On petition for rehearing on motion to dismiss appeal. OVERRULED.

Mr. G. Evert Baker, for the petition.

Messrs. Cochran & Eberhard, opposed.

PER CURIAM.—In a petition for rehearing respondent calls attention to several defects in the proceeding to obtain service of summons by publication, in addition to those particularly pointed out in the brief heretofore presented, and insists that these defects rendered the original proceedings wholly void. The objections are serious and go to the vital merits of the appeal, and should not be decided without full oral argument.

We, therefore, adhere to our original decision and deny the motion to dismiss, with permission to renew at the hearing where all the questions raised can be more fully discussed. REHEARING DENIED.

Argued June 6, reversed June 24, 1919.

ON THE MERITS.

(182 Pac. 136.)

Order vacating default decree for plaintiff reversed. REVERSED.

For appellant there was a brief over the name of *Messrs. Cochran & Eberhard,* with an oral argument by *Mr. Colon R. Eberhard.*

For respondent there was a brief and an oral argument by *Mr. G. Evert Baker.*

PER CURIAM.—7. The material facts in this case are sufficiently stated in *Wade* v. *Wade, ante,* p. 642 (176 Pac. 192), which involved the determination of a motion to dismiss, which motion went practically to the whole merits of this appeal.

After that decision learned counsel for the plaintiff suggested, upon petition for rehearing, that there were other defects in the original proceedings, which were so serious as to render the order permitting the amendment of proof of service, absolutely void. Whereupon we granted permission to respondent to renew the motion to dismiss, upon the final hearing: *Ante,* p. 649 (178 Pac. 799).

Since that hearing we have carefully re-examined the record and are satisfied the Circuit Court had jurisdiction to permit the amendment *nunc pro tunc,* of the original proof of service, and that the original decree of divorce rendered on June 23, 1917, was a valid decree. This being the case, the court was without power to vacate said decree on May 20, 1918. The order of May 20, 1918, is therefore reversed.

REVERSED.

Argued March 28, affirmed April 22, rehearing denied July 1, 1919.

SEASIDE, CITY OF, *v.* RANDLES.

(180 Pac. 319.)

Contracts—Construction Contract—Waiver—Acceptance of Work.

1. Acceptance of work done under a construction contract does not constitute a waiver of latent defects of which the owner was ignorant at the time or which may appear thereafter.

Municipal Corporations—Improvements—Sewer Contract—Acceptance of Work—Waiver of Defects.

2. Where sewer contract expressly stated that engineer or inspector was not authorized to accept or approve work not done according to the contract, and reserved to the city alone the power to accept and approve work, city's acceptance and payment of contract price, without knowledge of defects not discoverable by an ordinary inspection, will not be construed a waiver or an estoppel to claim damages for such defects upon discovery thereof.

Contracts—Building Contracts—Acceptance or Rejection by Architect.

3. A contract which provides for work of construction to be performed in the best manner, and the materials of the best quality, subject to acceptance or rejection of an architect or engineer, all to be done in strict accordance with the plans and specifications, does not make acceptance by architect or engineer final and conclusive, and will not bind the owner or relieve the contractor from the agreement to perform according to plans and specifications.

Municipal Corporations—Improvements—Acceptance of Work—Prima Facie Evidence.

4. The acceptance of work by municipality is only *prima facie* evidence that the work has been done in substantial compliance with the terms of the contract.

Principal and Agent—Misconduct of Agent—Violation of Instructions.

5. Principal is never charged with consequences of agent's misconduct in violating his instructions except for the protection of some third person who has been misled by a reliance on an ostensible authority of the agent.

Municipal Corporations—Sewer Contract—Authority of Inspector—Acceptance of Work.

6. Where sewer contract expressly stipulated that inspector or engineer was without authority to accept or reject the work when not done according to the contract, contractor had no right to suppose that the city engineer or inspector was authorized to permit any deviation from the contract.

Municipal Corporations—Sewer Contract—Breach by Contractor—Rights of City.

7. That city did not see fit to reconstruct sewer in precisely the same manner and according to the same plans and specifications under provision in contract giving it the right to so do upon contractor's breach did not affect the right of the city to recover damages for breach by contractor.

Municipal Corporations—Sewer Contract—Payment by City—Release of Surety.

8. Payment by city for work accepted by it under sewer contract, under the honest belief that work was done in the manner required by the contract, did not release the surety.

Municipal Corporations—Sewer Contract—Breach by Contractor—Measure of Damages.

9. On sewer contractor's failure to construct sewer according to plans and specifications, the city's measure of damages is reasonable

cost and expense of procuring the work and labor to be done and furnishing the necessary material in order to make the sewer system conform to the contract.

Municipal Corporations—Sewer Contract—Breach by Contractor—City's Right of Action.

10. On sewer contractor's failure to construct sewer system according to the contract plans and specifications, city had the right to prove its damages without waiting for the sewer system to be reconstructed.

Contracts—Building Contracts—Approval by Supervising Engineer—Collusion.

11. An owner is not bound as against his contractor by the acts of a supervising engineer or inspector in approving work done by the contractor where such approval is the result of either bad faith, collusion, or gross negligence.

Municipal Corporations—Sewer Contract—Inspection of Work—Waiver.

12. That work on a sewer contract was performed in the absence of city engineer or inspector in violation of a contract, without objection by either inspector or engineer, was not a waiver by city of defects in the work, although the engineer or inspector knew work was being imperfectly done, where contract provided that engineer and inspector should not have authority to accept or reject work not performed according to the contract.

Municipal Corporations—Sewer Contract—Breach of Contract—Action for Damages—Negligence of City Engineer or Inspector.

13. In city's action against sewer contractor for failure to construct sewer according to contract, where contractor denied that work was not constructed according to contract, the negligence of city engineer or inspector in examining and inspecting work was not material, the issue being whether or not work was done in accordance with contract plans and specifications.

Municipal Corporations—Breach of Sewer Contract—Action for Damages—Burden of Proof.

14. City suing sewer contractor for failure to construct sewer according to contract plans and specifications has burden of proving that contractor failed to perform the requirements of contract specifically as mentioned in the complaint.

Municipal Corporations—Sewer Contract—Action for Breach—Defenses.

15. In city's action against sewer contractor for failure to construct sewer according to the contract, it was no defense that the plans and specifications were defective, and that sewer, if constructed in accordance therewith, would have been worthless.

Municipal Corporations—Action on Sewer Contract—Admissibility of Evidence.

16. In city's action against sewer contractor for failure to construct sewer according to contract, where contract expressly stipulated that city engineer had no authority to release contractor from a

necessary and important requirement of the contract, evidence that engineer had instructed contractor's foreman to deviate from plans and specifications was inadmissible.

Pleading—Amendment of Complaint—Action on Sewer Contract.

17. In city's action against sewer contractor for failure to construct sewer according to the plans and specifications, where contractor denied that work had not been performed in accordance therewith, and where contract pleaded showed that city engineer had no authority to release contractor from an important requirement of the work, court properly refused contractor permission to amend complaint so as to allege that engineer had directed contractor's foreman to deviate from the plans and specifications.

Evidence—Sample Sewer-pipe—Rebuttal of Expert Evidence.

18. In city's action against sewer contractor for failure to construct sewer according to specifications requiring mortar to be made of two parts sand to one part of cement, where there was expert evidence for contractor that such mortar would disintegrate in a very short time, the sample sewer-pipe, laid six years prior thereto with use of same proportion of sand and cement, was admissible to show that mortar used in the joints did not disintegrate, such evidence being competent to rebut expert testimony.

Municipal Corporations—Action on Sewer Contract—Instructions.

19. In city's action against sewer contractor for failure to construct sewer according to plans and specifications, where contract required contractor to make joints tight and to fill every part of the joint with mortar where required, or oakum where required, instruction that it was contractor's duty to make a "tight joint" in each of the sewer joints, with cement mortar of the required mixture, was proper.

Contracts—Construction—Province of Court.

20. It is the duty of the court to construe a written contract.

Evidence—Action on Sewer Contract—Admissibility of Evidence—Intentions of Witness.

21. In city's action against sewer contractor for failure to construct sewer according to contract, involving issue of whether city had accepted the sewer, it was proper for city engineer, after having testified that in accepting he relied upon contractor's statement, to testify that he would not have accepted sewer if he had known the true facts.

From Clatsop: JAMES A. EAKIN, Judge.

In Banc.

This is an action to recover damages for the failure of defendant Randles to construct a sewer in the City of Seaside in accordance with his contract, and the plans and specifications. The defendant Randles'

surety, the Aetna Accident & Liability Company, hereinafter referred to as surety, is also made a party defendant. The cause was tried by the court and a jury and a verdict rendered in favor of plaintiff. From a consequent judgment defendants appeal.

On July 7, 1914, plaintiff and defendant Randles entered into a written contract whereby Randles agreed for certain unit considerations therein expressed to furnish all materials, perform all labor and construct for plaintiff in the City of Seaside a sewer system which included one main sewer, with some 250 laterals, also including several manholes, etc., according to the plans and specifications which were made a part of the contract, and which are set out in full in the complaint. Those portions of the specifications which particularly bear upon the issues involved are as follows:

"2. PLANS:

"This sewer shall be constructed in accordance with the plans and specifications on file in the office of the City Auditor and Police Judge. * *

"8. INSPECTION:

"The contractor shall not begin work on this sewer until he has notified the Engineer and an inspector has been placed in charge of the work. It shall be the duties of the inspector to direct the construction of the work and the manner of carrying on the same; also to inspect all materials used on the work and to approve or reject the same. No material of any kind shall be used on any part of this work until inspected and approved by the Engineer or Inspector and all rejected or condemned material shall be removed from the work at once. Instructions given by the inspector shall be respected and executed by the contractor, but no inspector shall have the power to waive the obligations of the contractor to furnish good materials or perform sound and reliable work as herein specified; and any failure or omission of the Inspector or En-

gineer to condemn any defective material or work shall not release the contractor of the obligation to at once tear out, remove and properly reconstruct the same at his own cost at any time upon the discovery of the defect, and upon receipt of the notice of the Engineer to do so. No part of this sewer shall be constructed in the absence of an inspector and any work so performed shall be deemed in violation of these specifications, and the Engineer may order the same to be removed by the contractor and reconstructed at once. Upon the neglect or refusal of the contractor to reconstruct work rejected by the Engineer within 24 hours after receipt of notice, the same may be removed and reconstructed under the direction of the Engineer at the expense of the contractor.

"16. LAYING:

"Before being laid, all pipe shall carefully be examined and passed upon by the Inspector. The accepted pipe, before being lowered into the trench shall be fitted together, matched and marked in the order in which they are to be laid. The trench shall be carefully shaped and graded to the line and grade given by the inspector. Crosscuts deep enough to receive the bell of the pipe shall be cut in the bottom of the trench, so that the pipe has a solid bearing along its entire length, before being laid, the outside of the spigot and the inside of the bell shall be carefully cleaned. The lower half of the bell of the preceding pipe shall be filled with cement mortar before the insertion of the spigot end, the pipe shall then be pressed into place so that the spigot end will be not more than one-quarter (¼) of an inch from the shoulder of the bell, care being taken to have the inside surfaces of the pipes flush and even. The bell shall then be filled flush with the outside all around, with cement mortar, pressing it into shape with the hand, carefully rounding it off at least one inch on the body of the entering pipe. After being laid, the joint of each pipe must be carefully scraped smooth with a circular disk or swab to remove any surplus cement. After the pipe has been laid and cemented, fine earth or sand shall

be carefully rammed under and halfway up the sides of the pipe before the next is laid.

"The cement mortar shall be composed of one part cement and two parts sand.

"The joints of all sewer pipe laid below an elevation of 7 feet, approximately 3,000 lineal feet, shall be laid with a gasket of oakum dipped in hot asphaltum of the proper consistency. The oakum gasket when thoroughly compacted with a caulking iron shall fill the bell to one-half (½) its length after which the joint will be cemented in the usual manner. * *

"29. TERMS.

"The contractor will be paid monthly a sum equal to eighty per cent on all finished work, and each class of work as set forth in these specifications shall be considered separately and paid for; the remaining twenty per cent shall be paid upon the completion of the entire contract."

At the same time and as a part of the contract defendant Randles, as principal, and defendant Aetna Accident & Liability Company, a surety company, as surety, executed a bond in the penal sum of $12,921 guaranteeing the full and faithful performance of the contract, as well as the payment by the contractor for all material used in the construction of the sewer and labor performed thereon. The bond, a copy of which is set forth in the complaint, contained all the statutory requirements.

Upon the execution of the contract, Randles commenced work on the sewer system and continued working thereon until the twenty-second day of September, 1914, when he represented to the plaintiff that he had fully completed the same in accordance with the contract. Thereupon, plaintiff as it alleges having no knowledge to the contrary, and believing that the sewer had been properly completed and the work done in accordance with the plans and specifications, ac-

cepted the work and paid Randles in full therefor the sum of $12,885. That defendant Randles failed in several particulars to construct the sewer system in accordance with the plans and specifications. A part of the allegations in regard thereto being as follows:

"This plaintiff alleges that the said defendant Randles made the necessary excavation for the trenches for the main sewers to the proper depth, but fraudulently and for the purpose of cheating, wronging and defrauding this plaintiff, and for the purpose of securing the payment of the contract price for said work without performing the contract, without the knowledge of plaintiff, secretly and fraudulently, in the laying of said sewer pipe above seven foot elevation and also below seven foot elevation both in the main and laterals and branches, neglected to and did not fill the lower half of the bell of any pipe with cement mortar before or after insertion of the spigot end, which will be hereinafter referred to, for the sake of brevity, as joints of the pipe, but placed and laid said pipes together, namely, the spigot end into the bell end without placing any cement in the lower portion thereof, namely, the portion thereof lying upon the bottom of the trench, not exposed to view from the top or sides of the trench, being about one-fourth of the circumference of the pipe, such portions being left wholly without any cement mortar.

"This plaintiff further avers that the said defendant Randles purposely, secretly and fraudulently, with the intent and purpose aforesaid, and without the knowledge of plaintiff, in all that portion of the sewer pipe, including laterals, laid in trenches above the elevation of seven feet, did not place in the joints between the spigot end and the bell end of the sewer pipe resting upon the bottom of the trench and not exposed to view from the top or sides of the trench, being about one-quarter of the circumference of each pipe, any cement mortar, or any mortar at all, and in all portions of said sewer pipe laid below the elevation of seven feet did not place in that portion of the joints

or spigot end and bell end lying at the bottom of the trench, not exposed to view from the top or sides of the trench, being about one-quarter of the circumference, either oakum or cement mortar, or any filler at all, but left such portions of such pipes in each of said elevations, both above and below seven foot elevation, throughout the entire pipe or sewer line, entirely open and unclosed, so that water, gas and sand could pass freely from the outside into the inside of each joint of sewer pipe laid, and earth, water and gas did so pass, accordingly as hereinafter mentioned, all of which was done secretly and purposely by said defendant, for the purpose of cheating and defrauding plaintiff and without the knowledge or consent of plaintiff.

"That in all that portion of said sewer pipe above an elevation of seven feet exposed to view from the top and sides of the trench, being about three-fourths of the circumference of each joint, the defendant placed cement mortar, not of the consistency of one part of cement to two parts of sand, but a mortar consisting of a very small portion of cement, mixed with earth, debris and a large quantity of sand, and without any consistency and worthless for the purposes intended and required by said specifications.

"That in all that portion of said sewer system which required trenches to be excavated below an elevation of seven feet, which plaintiff avers consisted of over three thousand lineal feet, all joints of which, by the terms of the specifications and contract aforesaid, were required to be laid and filled with a gasket of oakum dipped in hot asphaltum of proper consistency, and thoroughly compacted with a caulking iron, filling the bell one-half inch, said defendant in manner and form only placed in that portion only of the joints exposed to view from the top and sides of the trench, not exceeding three fourths of the circumference of the pipe, a small and insufficient gasket of oakum, not dipped in hot asphaltum, and not compacted so as to fill the bell one-half inch; in fact, not to exceed one-quarter of an inch, and then in such portion of said

joints placed an alleged mortar, but such mortar was not one part cement to two parts sand, but contained a mixture of a very small portion of cement to a large mixture of earth and sand, with no consistency whatever, and worthless for any purpose, thereby rendering said sewer entirely open on the bottom side, with worthless mortar on the top side.

"This plaintiff further avers that no mortar used or employed by said defendant Randles in said work was composed of one part cement to two parts sand, but all mortar used and employed in laying said sewer pipe, including main sewers and laterals, was a worthless mixture, composed of very little cement, mixed with earth, debris and a large quantity of sand, with no consistency or strength, and pervious to water and elements and not of sufficient strength to hold the pipe together to prevent the escape of water or gas, and was entirely worthless for any purpose, all of which was wholly unknown to plaintiff at the time plaintiff accepted said work and paid defendant Randles therefor. That at the time plaintiff accepted said work, it believed said work to have been done honestly and in accordance with the terms of the contract.

"This plaintiff further avers that under the terms of said contract, plans and specifications, plaintiff was required to excavate 250 trenches, leading from the main sewers to the curb line, for laterals, and was required to lay sewer pipe therein accordingly as hereinbefore alleged, from the main sewer to such curb line. That said defendant, Randles, with the intent and for the purpose hereinbefore alleged, fraudulently failed and neglected to and did not excavate the trench for the laterals from the main sewer to the curb line of the streets, or lay the sewer pipe in such trench from the main sewers to the curb line. On the contrary, in many instances, the number being to plaintiff unknown, because of the fact that the same are many feet below the surface of the earth and would require the excavation of all laterals to ascertain the exact number, only dug such trenches a short distance from the main sewer and laid the pipe only a short

distance from the main sewer, but falsely represented to plaintiff that the trench was excavated underneath the surface to the curb line and the sewer pipe laid accordingly as provided in the contract to such curb line, which false statements and representations plaintiff believed and relied upon, and was deceived thereby; but alleges, as a matter of fact, such trenches were not dug to the curb line and the laterals not laid, the exact number of which and the length of which plaintiff is unable to allege, accordingly as hereinbefore set forth.

"Plaintiff further avers that because the defendant Randles failed and neglected to complete the contract, and did not lay the sewer pipe accordingly as provided in the contract, and because of the openings left in the joints, and the inferior mortar used in laying the pipe, and the failure to employ the proper oakum gaskets as required, the sewers have become filled with sand and debris, and the foundation thereby destroyed, and the pipes broken; that the system is worthless and that plaintiff is damaged in the sum of $12,885.00, by reason of the wrongful and fraudulent acts of defendant Randles, as alleged in the complaint.

"That the sewer system in question was laid in fine sand, the territory covered by the system having been many years prior thereto covered by the waters of the ocean, but became filled at a considerable depth below the bottom of the sewer trench with fine sand, the water of the ocean having receded therefrom."

Defendant Randles filed a separate answer in which he denied the breach of contract and denied the fraud and set up affirmatively three separate defenses: First. That the work of constructing the sewer was performed by him under the direction and superintendence of the city engineer and inspector of the plaintiff and was done in their presence and that the same and all materials entering into the same were examined, approved and accepted at the time of doing the work and the using of the materials; that the en-

gineer and inspector well knew at all times how the work was being done. And that on September 22, 1914, plaintiff accepted the work and paid for the same in full. Second. That the city engineer was the arbiter agreed upon by the parties to decide whether the work had been done according to the contract, and that he had decided that it was so done and performed. And, Third. That the faults in the sewer referred to in the complaint were the results of improper and faulty plans and specifications and not the fault of the manner in which the work was done.

The defendant surety also filed a separate answer in which the breach of contract and the fraud alleged in the complaint were denied and three separate defenses were set up, the first and second thereof being the same as the first and second separate defenses set out in Randles' answer. The third separate defense being that, under the contract, the plaintiff had agreed to inspect the work and determine for itself as it progressed whether it was being properly and satisfactorily performed; and that 20 per cent of the contract price was to be retained by plaintiff until the completion of the work; that the surety had the right to rely upon plaintiff performing the agreements, which were for the benefit of the surety; that on September 22, 1914, there was in plaintiff's hands, of the contract price for the work still unpaid to Randles, the sum of $6,343.58, and that plaintiff without notice to or knowledge or consent of the surety paid the sum to Randles; and that under the contract, upon which the surety had the right to rely, plaintiff was not authorized to rely or depend upon any statements made to it, but must ascertain the facts as to the doing of the work as provided in the contract and specifications; that by reason of paying Randles in full without notice to or consent

of the surety, the surety was thereby released and discharged of all obligations.

Plaintiff filed replies putting in issue the material allegations of the separate defenses contained in the answers. AFFIRMED.

For appellants there was a brief with oral arguments by *Messrs. Malarkey, Seabrook & Dibble* and *Mr. James L. Hope.*

For respondent there was a brief with oral arguments by *Mr. Victor Miller, Messrs. G. C. & A. C. Fulton* and *Mr. Edw. C. Judd.*

BEAN, J.—Defendants' first contention is that the complaint fails to state facts sufficient to constitute a cause of action against either of the defendants. Under this division of argument, defendants also submit two assignments of error: Number XLIV. That the court erred in giving to the jury, over the objection and exception of defendants, instruction, to wit:

"If you find for the plaintiff in the particulars complained of, as I have heretofore instructed you, then it will be your duty to determine the fair and reasonable amount it will cost the plaintiff to repair the sewer in the particulars wherein defendant Randles failed, to the end that plaintiff will have a sewer of the character contracted for, and bring in your verdict accordingly."

And also assignment Number XLV. That the court erred in giving the instruction to the effect that:

"If you should find that the defendant Randles failed to lay this sewer in the particulars complained of and that the plaintiff accepted the same without knowledge of such facts, in order to determine the amount, if any, the plaintiff is entitled to recover in this case, you have the right to take into consideration

the cost to plaintiff of the necessary excavations and work and labor and materials necessary to be employed in making such repairs, as in your judgment from the evidence in this case, shall be required in order to make the sewer correspond with the contract."

It is the main contention of counsel for defendants that the plaintiff cannot recover for the reasons:

First. Under the circumstances presented by the complaint the acceptance of and the payment for the work as completed in accordance with the contract precludes the recovery of damages for patent defects, unless such acceptance and payment were obtained by defendants' fraud.

Second. The allegations of the complaint failed to state any facts constituting fraud in the procuring or inducing of the acceptance of payment of the work.

Third. The complaint fails to allege that the city removed the alleged defective work and properly reconstructed the same, stating the expense thereof.

Fourth. That it appears on the face of the complaint that the surety has been released and discharged from all liability.

1. It is convenient first to state the rule of law by which the facts of the case are to be measured. An acceptance of work done under a construction contract does not constitute a waiver of latent defects of which the owner was ignorant at the time, or which may appear thereafter: 9 C. J., p. 798; *Fike* v. *Stratton,* 174 Ala. 541 (56 South. 929); *Steltz* v. *The Armory Co.,* 15 Idaho, 551 (99 Pac. 98, 20 L. R. A. (N. S.) 872); *Monahan* v. *Fitzgerald,* 164 Ill. 525 (45 N. E. 1013); *Korf* v. *Lull,* 70 Ill. 420; *Holslag* v. *Morse,* 188 Ill. App. 607; *Toronto Radiator Mfg. Co.* v. *Alexander,* 2 Ter. L. R. 120; *Eaton* v. *Gladwell,* 108 Mich. 678 (66 N. W. 598);

Dutton v. *Million,* 114 Ark. 330 (169 S. W. 1183); *Utah Lumber Co.* v. *James,* 25 Utah, 434 (71 Pac. 986).

In order for an acceptance to be a waiver it must be under such circumstances as to show that the party accepting knew or ought to have known that the contract was not fully performed. 6 R. C. L., p. 991, Section 359, where the rule is stated thus:

"Where work is accepted with knowledge that it has not been done according to the contract, or under such circumstances that knowledge of its imperfect performance may be imputed, the acceptance will generally be deemed a waiver of the defective performance. But this rule does not apply to latent defects. The acceptance of work which has been defectively done, the defects being unknown and not discoverable by inspection, does not amount to a waiver of the imperfect performance": *Flannery* v. *Rohrmayer,* 46 Conn. 558 (33 Am. Rep. 36); *Van Buskirk* v. *Murden,* 22 Ill. 446 (74 Am. Dec. 163); *Brent* v. *Head, Westervelt & Co.,* 138 Iowa, 146 (115 N. W. 1106, 16 L. R. A. (N. S.) 801); *Ludlow Lumber Co.* v. *Kuhling,* 119 Ky. 251 (83 S. W. 634, 115 Am. St. Rep. 254, and note); *Thompson Mfg. Co.* v. *Gunderson,* 106 Wis. 449 (82 N. W. 299, 49 L. R. A. 859); *Iaege* v. *Bossieux,* 15 Gratt. (Va.) 83 (76 Am. Dec. 189).

The evidence introduced upon the trial tended to support the allegation of plaintiff's complaint and to show that soon after the sewer was accepted and Randles had received his pay therefor, the sand at many points caved in from the top of the excavation and a large quantity of sand was discovered at the outlets; that an island of sand was thereby formed in the Necanicum River near where the outlets were. This would cause the ground on top of the sewer to cave in and large holes in several places occurred in the street where the sewer was laid. In many instances, where

these cave-ins occurred, the city dug down to the sewer and discovered that while there was cement in the joints on the top of the sewer-pipe, there was no cement on the part underneath for about one-fourth the diameter of the pipe; that the part of the pipe underneath was entirely open and no cement mortar had ever been placed therein. The main sewer was laid along Seventh Street, the principal street in the City of Seaside. These cave-ins became so numerous on this street that about 250 yards of the main sewer was excavated and it was discovered that in almost every joint no cement mortar had been placed on the underneath side of the bell, while on the top for about three fourths of the diameter of the pipe, which would be visible to one standing on the bank of the trench at the time the pipe was laid, the cement mortar seemed to have been well filled in. Although the mortar in practically all instances was not two parts sand to one part cement, but was filled with earth and dirt, making the joint practically worthless. The sand was so fine that it ran into the sewer-pipe and was carried down into the Necanicum River and entirely stopped up the outlet of the pipe.

That there were about 3,000 feet of the main sewer laid below an elevation of seven feet, which, according to the contract, was required to be laid with a gasket of oakum dipped in hot asphaltum of the proper consistency, and the oakum gasket when thoroughly compacted with a calking iron to fill the bell to one half of its length, after which the joints should be cemented in the manner provided for in the specifications. As a matter of fact, there was no oakum gasket placed in any of the sewer joints at all. The sewer-pipe laid below the elevation of seven feet was laid in the same manner as hereinbefore indicated with an inferior

mortar, and the part underneath left entirely open; that although the contract required all openings in laterals to be closed with vitrified or cement cover, puttied in with cement mortar on the outside only, this was not done. That the openings in all the laterals were not closed at all, while a part of them had shingles placed on top of the openings, leaving space for sand to go through, whereby the sand filled the laterals and they became useless.

The evidence also tended to show that there were a number of instances where the sewer-pipe was laid in water. The specifications required that where water is encountered, it must be drained away before any pipe or concrete is placed in the trench; that Randles, without regard to this provision, laid the pipes and filled in the cement joints as before indicated, in many instances in running water; that the result was that whatever mortar was placed in the joints was washed out. The proof indicated that Randles designedly and deliberately failed to perform his contract in the manner specified, and perpetrated a fraud upon the city. That the city officials had no notice or knowledge of these things, or the fact that the sewer was not constructed according to the contract at the time of the acceptance; that the contractor deceived the engineer in charge and the inspector; that the pipe being laid in a deep, narrow trench, the defects or failures to cement the joints of the pipe underneath could not be discovered by an ordinary inspection, and the defects should be termed latent; that the city officials believed that the sewer system was constructed in accordance with the contract and did not discover otherwise until about the tenth day of January, 1916. It thereupon notified Randles and the surety company to make the contract good. Randles came several times and made

various excavations and temporary repairs to the joints and then refused to do anything at all. The surety company denied liability and refused to do anything in regard to the matter.

According to the contract and specifications, neither the engineer nor the inspector was the final arbiter between the parties, it being specially provided in Specification Number 8:

"No inspector shall have the power to waive the obligation of the contractor to furnish good materials or perform sound and reliable work as herein specified; and any failure or omission of the Inspector or Engineer to condemn any defective material or work shall not release the contractor of the obligation to at once tear out, remove and properly reconstruct the same at his own cost at any time upon the discovery of the defect, and upon receipt of the notice of the Engineer to do so."

2. The contract for the improvement does not authorize either the engineer or the inspector to accept or approve the work when not done according to the contract. It is expressly stipulated that they have no such power. The municipality alone reserves the power to accept and approve the work. Therefore, the acceptance by the city and payment of the contract price, where the work is not done in accordance with the contract, made without knowledge of the defects complained of, such defects not being discoverable by an ordinary inspection, will not be construed as a waiver or an estoppel to claim damages for such defects upon discovery thereof: *Rogue River Assn.* v. *Gillen-Chambers Co.*, 85 Or. 113–115 (151 Pac. 728, 165 Pac. 679); *United States* v. *Walsh*, 52 C. C. A. 419 (115 Fed. 697); *Ritchie* v. *City of Topeka*, 91 Kan. 615 (138 Pac. 618); *Mercantile Trust Co.* v. *Hensey*, 205 U. S.

298 (27 Sup. Ct. Rep. 535, 10 Ann. Cas. 572, 51 L. Ed. 811).

The evidence produced on behalf of plaintiff tended to prove defendant Randles guilty of the fraud, alleged in the complaint, all without knowledge of plaintiff, and that on account of the fraud practiced the sewer was worthless; that plaintiff was thereby induced to and did accept the sewer system under the belief that it was completed according to the terms of the contract; that Randles not only represented that the work was completed according to the plans and specifications, but after his attention was directed to the condition of the sewer, when he excavated some of the pipe, all that he could on account of the mud around it and reached around under the pipe, he claimed that "there was no trouble with the joints."

3. A contract which provides for work of construction to be performed in the best manner and the materials of the best quality, subject to acceptance or rejection of an architect or engineer, all to be done in strict accordance with the plans and specifications, does not make the acceptance by the architect or engineer final and conclusive, and will not bind the owner or relieve the contractor from the agreement to perform according to plans and specifications: *Mercantile Trust Co.* v. *Hensey*, 205 U. S. 298 (27 Sup. Ct. Rep. 535, 10 Ann. Cas. 572, 51 L. Ed. 811); *General Fireproofing Co.* v. *Wallace & Son*, 175 Fed. 650 (99 C. C. A. 204); *Hartupee* v. *City of Pittsburg*, 97 Pa. 107.

4. The acceptance by municipal officers of work done on a contract for a municipal improvement is only *prima facie* evidence that the work has been done in substantial compliance with the terms of the contract: *Sweeney* v. *Jackson Co.*, 93 Or. 96, (178 Pac. 365); *Gulick* v. *Connely*, 42 Ind. 134; *Barker* v. *Nichols*, 3

Colo. App. 25 (31 Pac. 1024); *Korf* v. *Lull*, 70 Ill. 420; *Kilbourne, Jenkins & Co.* v. *Jenning & Co.*, 40 Iowa, 473.

5, 6. A principal is never charged with the consequences of the misconduct of his agent in violating his instructions, except for the protection of some third person who has been misled by a reliance of an ostensible authority of the agent: *United States* v. *Walsh*, 52 C. C. A. 419 (115 Fed. 697). Randles had no right to suppose that the engineer for the city or the inspector was authorized to permit any deviation from the contract. The testimony tended to indicate that the municipality did not know that any such deviation had taken place, and under the circumstances of this case such knowledge could not be imputed to it. Therefore, the acceptance of the work and the making of the final payment did not prejudice the right of the municipality upon discovering the truth to maintain its action for the breach of the contract as exemplified by the authorities above cited.

7. The contract provided that Randles should furnish all the material, implements and perform the labor necessary to construct the sewer system in conformity with the terms, conditions and requirements of the plans and specifications therefor. The bond obligatory executed by him and the surety company was conditioned that he should "truly keep, perform and fulfill all and every of the covenants, conditions, stipulations and agreements in said contract mentioned to be performed and fulfilled." The plans and specifications were made a part of the contract. While provision was made that, "Upon the neglect or refusal of the contractor to reconstruct work rejected by the Engineer within 24 hours after receipt of notice, the same may be removed and reconstructed under the direction of the Engineer at the expense of the contractor,"—

thus giving the city the right to so reconstruct the work—yet it was not compelled to do so, and the fact that the municipality did not see fit to reconstruct the sewer contracted for by Randles in precisely the same manner and according to the same plans and specifications would not affect the right of the municipality to recover damages for the breach of the contract on the part of Randles. This is plainly held in *United States* v. *United States Fidelity & G. Co.*, 236 U. S. 512 (35 Sup. Ct. Rep. 298, 59 L. Ed. 696). The contention made by defendants that the city must first reconstruct the sewer system cannot therefore be maintained.

8. It is further maintained on behalf of defendant that the surety was released. The payment by the city for the work accepted by it under an honest belief that it was done in the manner required by the contract did not release the surety: *Mayor etc. of City of Newark* v. *New Jersey Asphalt Co.*, 68 N. J. Law, 458 (53 Atl. 294–296). By the express stipulations of its bond the surety company under the circumstances of this case is liable for the breach of the contract by Randles.

9. The measure of damages in this case is the reasonable cost and expense of procuring the work and labor to be done and furnishing the necessary material in order to make the sewer system to conform to the provisions of the contract: 3 Sutherland on Damages (3 ed.), § 699; *Williams* v. *Island City Milling Co.*, 25 Or. 573 (37 Pac. 49); *United States* v. *Walsh*, 52 C. C. A. 419 (115 Fed. 697). There was no error in denying the motion for a nonsuit which was interposed at the appropriate time by counsel for defendants.

10. The trial court instructed the jury in conformity with the law here laid down, and we find no error in that respect. The plaintiff had the right to prove

such damages without waiting for the sewer system to be reconstructed. In *United States* v. *United States Fidelity & G. Co.*, 236 U. S. 512 (35 Sup. Ct. Rep. 298, 59 L. Ed. 696), the court held that where a contractor had agreed with the United States to erect a certain structure and had failed to do so, the United States had a cause of action against it immediately upon his failure to finish the work and it was not necessary for the government to complete the work, but might abandon it and prepare entirely new plans and specifications. Counsel for defendants in conformity with their contention requested the court to instruct the jury in substance that the city could not avoid knowledge of how the work was done by proving that its agents failed to perform their duty of inspection, and that defendants were not responsible for such inspection, and predicates error upon the refusal of the court to so instruct the jury, the request was properly refused. It appears that the trench for the sewer-pipe was not entirely excavated; about eight feet being excavated and then two to four feet tunneled, so that it was practically impossible for the inspector to see whether all of the pipe joints were properly cemented. He could not, of course, see the under side from the bank of the trench and he trusted Randles to a certain extent. Randles should not be permitted to take advantage of his own wrong and say that the engineer and inspector for the city were negligent in permitting him to deceive them.

11. An owner is not bound as against his contractor by the acts of a supervising engineer or inspector in approving work done by the contractor where such approval is the result of either bad faith, collusion or gross negligence: *Reid* v. *Alaska Packing Co.*, 47 Or. 215, 221 (83 Pac. 139); 2 C. J., p. 834; *Chandler* v.

Wheeler (Tenn. Ch. App.), 49 S. W. 278; *Rogue River Assn.* v. *Gillen-Chambers Co.*, 85 Or. 113 (151 Pac. 728, 165 Pac. 679, 1183).

12. Contention is made on behalf of defendants that under the provisions of the contract:

"No part of this sewer shall be constructed in the absence of an inspector, and any work so performed shall be deemed in violation of these specifications, and the engineer may order the same to be removed by the contractor and reconstructed at once."

That the larger part of the sewer was laid in the absence of the inspector; that the inspector and engineer had knowledge of this fact. Therefore, it is contended that this was negligence on the part of the plaintiff which released the surety. This stipulation should be considered with the other provisions of the contract contained in Specification Number 8 to the effect that no inspector shall have power to waive the obligation of the contractor to furnish good material or perform sound and reliable work as therein specified; that any failure of the inspector or engineer to condemn any defective material or work shall not release the contractor of the obligation to properly reconstruct the same at any time upon discovery of the defect, and upon notice to do so. The fact that work was done in the absence of the inspector or engineer which was not in accordance with the contract, although not objected to either by the inspector or engineer at the time, even if either or both knew the work was being imperfectly done would not be a waiver on the part of plaintiff according to the express terms of the contract.

13. The plaintiff alleged that Randles failed to perform the work according to the terms of the contract. The defendants denied this and pleaded that:

"Said defendant Randles performed said work only in the presence of and under the superintendence and directions of said City Engineer and Inspector and every piece of material and every bit of work furnished, laid and done by said defendant in the prosecution of said work was examined, inspected and approved by said City Engineer and Inspector, and said Engineer and Inspector examined and inspected all of said work and materials while said work was being done and knew how the same was being done and the quality thereof, and they approved and accepted the same."

And that defendant Randles performed and completed said work in conformity and accordance with the said contract, plans and specifications. The issue, therefore, was squarely raised as to whether or not the work was done in accordance with the stipulation therefor. We fail to see that negligence on the part of the city engineer or inspector could become material. The surety company in effect claims that by reason of the fact that Randles did not construct the sewer in conformity with the requirements of the contract but deceived the engineer and inspector for the city, and made them believe that he did properly construct the system, and defrauded the city, the surety is released. Such claim is not in accordance with the spirit or letter of the bond.

14, 15. The defendants contend that whatever bad or defective conditions appeared in the sewers were the result of defective plans and specifications and not of any faulty material or workmanship. It was incumbent upon the city to prove that Randles failed to perform the requirements of the contract specifically as mentioned in the complaint. It was no defense to this action for Randles to say that had he completed

the sewer system in accordance with the terms of the contract, that the sewer would have been worthless or that the plan was a bad plan. The only issue presented by the pleadings was whether or not Randles did those things that plaintiff claimed that he did not do. Defendants at the trial offered to prove by the testimony of expert witnesses that the condition of the sewer, as testified to by plaintiff's witnesses, was in their opinion the result of defective and improper plans and specifications. The trial court sustained an objection on the ground that the result was for the jury to determine. The circumstances were all detailed to the jury. Over the objection and exception of counsel for the defendants, the court charged the jury to the purport that it would not make any difference whether the plan adopted for this sewer was a good plan, or that a better plan could have been adopted; that this was no defense for Randles' failure to lay the sewer according to the contract and specifications; that the plaintiff was entitled to have the contract performed as agreed upon. If the contractor performed the work in accordance with the terms of the contract, he is entitled to pay without regard to the results. The court explained to the jury:

"That if you find from the evidence that defendant Randles constructed said sewer in accordance with the plans and specifications and that after the sewer was so constructed, it broke down and the joints went to pieces or were broken as alleged in the complaint and the caps or stoppers of the Y's and laterals were driven out so as to leave the pipes open, but you further find that such breaking or opening of the joints complained of in the complaint were on account of the faulty or defective or unsuitable character of the plans and specifications themselves and was not due to the faulty or defective material or work of the said de-

fendant Randles, then the defendants would not be liable for such damage and your verdict in that case would be for the defendants. * * "

Under the testimony in this case, we think the ruling was correct and that the instructions properly submitted the question to the jury.

Error is predicated upon the refusal of the court to permit John Matson, Randles' foreman, to testify that the engineer in charge of the work instructed him to leave out the oakum gaskets at the places required by the specifications. The defendants, by their answer, expressly alleged that Randles had performed the contract fully in accordance with the terms and conditions thereof. The court plainly told the jury that:

"If you find from the evidence that defendant Randles laid the pipe in accordance with the contract and specification in the instances I have indicated, then this will end the case and your verdict must be for the defendant."

The court further charged that:

"If the plaintiff, through its council, at the time it accepted and paid for the sewer, knew that Randles had not performed his contract in these particulars and had not filled these joints accordingly as provided by the specifications, as I have heretofore suggested, and with such knowledge, approved and accepted the work, then plaintiff cannot recover."

16, 17. Moreover, an examination of the record disclosing the terms of the contract reveals that the engineer had no authority to so release Randles from a necessary and important requirement of his contract, and the evidence offered was properly rejected. Therefore, the court rightly refused to allow the defendants to amend their answer so as to set up the fact that the engineer had directed the oakum gaskets

to be left out; the specifications expressly provide that the engineer had no such power. The authorities above cited sustain this holding.

18. During the trial of the case, the defendants offered evidence of experts in regard to the lasting quality of cement mortar made of two parts sand to one part of cement; that such mortar would disintegrate in a very short time; that it was porous; that water would percolate through the pores, and sand would also work its way through. In order to rebut such testimony, the plaintiff excavated two joints of sewer-pipe which had been laid for six years in the sand, at Seaside, within six feet of the sewer laid by Randles. The evidence tended to show that the mortar used in the joints of this sample sewer-pipe was two parts sand to one part of cement; that the pipe was laid in the same character of soil as the pipe in question. The cement joints were produced, offered and received in evidence. Opportunity was given defendants to examine the place from whence the sewer-pipe came. The purpose of the evidence was to rebut the statement that the cement mortar of a consistency of two parts sand and one part of cement in sewer joints was subject to disintegration in a short time. We think that the testimony was competent in order to rebut the theory of the experts to the contrary. The sewer-pipes and joints do not appear to have been offered or received in evidence as tending to prove that the sewer in question ought not to have failed.

19, 20. Error is predicated upon the instruction of the court to the effect that according to the terms of the specifications it was the duty of the defendant Randles to make a "tight joint" in each of the sewer joints with cement mortar of the required mixture, however difficult it would be to do this. This descrip-

tion of "tight joints" was plainly qualified by the instruction complained of that defendant Randles' contract to make these joints tight and to fill every part of the joint with mortar where required, or oakum where required "as required by the specifications." The specifications were before the jury and it being the duty of the court to construe the written contract, we see no error in so describing the calking of the joints instead of again specifying the particular manner in which the joints should be filled, especially when the term is qualified by reference to the requirement of the specification. A careful examination of the instructions of the court given to the jury, taking them as a whole, leads us to believe that the questions at issue were fairly submitted to and understood by that tribunal.

Assignment of error is predicated upon the overruling of the objection of defendants to the following question propounded to Mr. Bell, city engineer, to wit:

"Q. Now, what are the facts as to whether or not you relied upon the statement made to you by Mr. Randles in your acceptance of this sewer? * *

"A. I did."

21. The testimony concerning this question shows that Mr. Bell stated what Randles had stated to him. It also claimed as error that it was incompetent for this witness to testify that he would not have done as he did had he known the true facts. Testimony of the party as to what he believed, intended and relied upon was admissible: *Jarrell* v. *Young, Smyth, Field Co.*, 105 Md. 280 (66 Atl. 50).

In *Larson et al.* v. *Thoma*, 143 Iowa, 338, 345 (121 N. W. 1059, 1062), the court there says:

"The witness was further asked whether or not he would have bought that farm if he had not talked with

plaintiffs about it at all, and an objection to this question was sustained. We think the court might well have allowed the question to be answered. * * "

The question became important as to whether or not the municipality knew of the defect and what it would have done had it known of the same. This evidence was material: *United States* v. *Walsh,* 52 C. C. A. 419 (115 Fed. 697).

After a careful perusal of the able and exhaustive briefs and arguments of the respective counsel, and an examination of the record, we find no error. The judgment of the lower court is therefore affirmed.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE BENNETT took no part in the consideration of this case.

Argued May 21, affirmed June 18, rehearing granted October 8, 1918. Argued on rehearing April 2, reversed July 1, 1919.

STATE *v.* MERLO.*

(173 Pac. 317; 182 Pac. 153.)

Witnesses—Showing Inconsistent Statement—Party Introducing Witness.

1. Under Section 861, L. O. L., authorizing the party producing a witness to show he had made statements inconsistent with his testimony, as provided in Section 864, the state could call the attention of its witness to a prior inconsistent statement, together with the circumstances of time and place and persons present, to refresh his memory and induce him to correct his testimony or explain the inconsistency; the things to be avoided being showing his bad charac-

*The question of right to impeach one's own witness by proof of contradictory or inconsistent statements is discussed in note in 21 L. R. A. 426.

On right to impeach one's own witness because he has not testified as expected, where his testimony is not affirmatively injurious, see note in 42 L. R. A. (N. S.) 747. REPORTER.

ter, and introducing as substantive evidence unsworn or prior statements of witness.

[As to proof of prior contradictory statements, see note in 82 Am. St. Rep. 39.]

Criminal Law—Trial—Objections to Evidence.

2. Objection "irrelevant, immaterial, and not in rebuttal" goes to the introduction of the evidence on rebuttal, and does not, as is necessary for review, raise the question of it being evidence of another crime.

Criminal Law—Trial—Objections to Evidence.

3. Objection "irrelevant, immaterial, and incompetent and not proper rebuttal, and witness has not shown sufficient qualifications," can only be considered on the ground of evidence not being proper rebuttal.

Criminal Law—Order of Introduction of Evidence—Discretion of Court.

4. Order of introduction of evidence is in the sound discretion of the trial court.

Criminal Law—Harmless Error—Departure from Code Procedure.

5. Under Section 1538, L. O. L., departure from a mode of proceeding, even if prescribed by the Code, is not ground for reversal unless it appear that substantial rights of defendant have been prejudiced.

Criminal Law—Recalling Witness—Discretion.

6. Leave to recall a witness being by provision of Section 862, L. O. L., in the sound discretion of the trial court, it is only for abuse thereof that its ruling can be disturbed.

Criminal Law—Credibility of Witnesses—Instructions—"Falsely."

7. The court need not add the word "willfully" to the instruction prescribed by Section 868, subdivision 3, L. O. L., "that a witness false in one part of his testimony is to be distrusted in others," "falsely" importing this, and not being of the same import as "mistakenly."

Criminal Law—Appeal—Harmless Error—Constitution.

8. Article VII, Section 3, of the Constitution as amended in 1910, at least accentuates the law as it stood in regard to prejudicial error, in favor of an affirmance unless actual prejudicial error appears.

ON REHEARING.

Witnesses—Impeachment of Character of Own Witness.

9. In view of Section 861, L. O. L., a party who produces a witness of bad character cannot show the bad character of that witness and thus relieve himself from the injurious effects of any unfavorable testimony given by such witness.

Witnesses—Impeachment—Inconsistent Statements.

10. Under Section 861, L. O. L., if the witness fails to testify as he was expected to do, but does not give testimony prejudicial to the

party calling him, then the party producing the witness cannot impeach him by showing prior inconsistent statements.

Witnesses—Impeachment of Own Witness—Inconsistent Statements.

11. Under Section 861, L. O. L., where a presumably truthful person makes a statement and afterward as a witness makes an inconsistent statement to the surprise and prejudice of the party calling him, then the party calling the witness is not at fault, and should be permitted to repair the damage.

Witnesses—Impeachment—Inconsistent Statements.

12. In prosecution of wife for killing her husband, testimony of a state witness, who had stated that defendant and deceased quarreled, that he did not know who started the quarrels was not affirmatively prejudicial to the state, and such as to authorize the state, under Section 861, L. O. L., in impeaching the witness by evidence of prior inconsistent statements.

Criminal Law—Leading Questions—Reversible Error.

13. In prosecution for murder, that the state, after one of its witnesses had stated that he did not know whether defendant wife or the victim, her husband, started quarrels when "they used to quarrel," elicited testimony from the witness that he had made a contradictory statement before the grand jury *held* not to require reversal, in view of Section 1626, L. O. L., as to errors nor affecting substantial rights, and Section 858 as to leading questions; the witness being reluctant.

Criminal Law—Limited Use of Testimony.

14. Where a party is permitted to refresh the recollection of his own witnesses by directing attention to prior inconsistent statement, the court should inform the jurors that prior statement cannot be considered as substantive testimony.

Criminal Law—Improper Cross-examination—Harmless Error.

15. Assuming that cross-examination of defendant's witness with reference to whether defendant had the reputation of getting "drunk" was objectionable, answers of witness, "I don't think so," were without prejudice to defendant.

Witnesses—Quarrelsome Disposition of Accused.

16. In prosecution for murder, where the witness in question had given testimony on direct examination, from which it could be argued that the victim, defendant's husband, was either alone responsible for quarrels with defendant or an aggressive participant, the district attorney was well within the limits of Section 860, L. O. L., when he asked defendant's witness on cross-examination whether the quarrels began when defendant discovered that the husband did not have "lots of money."

Witnesses—Impeachment—Immaterial Matters.

17. The general rule is that when a cross-examination elicits from a witness matter that is immaterial or irrelevant the party conducting the cross-examination is concluded as to such matter, and cannot impeach the credibility of the witness by showing contradictory statements.

Criminal Law—Erroneous Admission of Testimony—Harmless Error.

18. In prosecution for murder, *held* that defendant was not prejudiced by reason of introduction in evidence of testimony as to her intoxication on the day of the homicide in rebuttal instead of in chief.

Criminal Law—Evidence of Independent Crime—Reversible Error.

19. In prosecution of defendant wife for the killing of her husband, permitting a witness to state what he had heard about the time defendant got a revolver and was going to kill "his uncle" was reversible error.

From Washington: GEORGE R. BAGLEY, Judge.

Department 2.

The defendant, Rosa R. Merlo, was indicted for the crime of murder in the second degree for the killing of her husband, Joseph Merlo. She was tried and convicted of manslaughter, and from the judgment of sentence appeals. The testimony of the plaintiff consisted of evidence tending to show the death of the victim, its cause, the nature of the wounds, the range of the bullet and description of the condition of the premises, of the various threats on the part of the defendant to take the life of her husband, statements of the defendant herself in relation to the homicide and in relation to evidence leading up to it and testimony tending to show the quarrelsome inharmonious life that the couple had led for some time prior to the homicide. AFFIRMED.

For appellant there was a brief over the names of *Messrs. Huston & Huston* and *Mr. Harry T. Bagley,* with oral arguments by *Mr. Samuel B. Huston* and *Mr. Bagley.*

For the State there was a brief and an oral argument by *Mr. Edmund B. Tongue,* District Attorney.

BEAN, J.—In the examination of the witnesses for the state, it appears some evidence crept into the record tending to show that at times defendant was in the habit of using intoxicating liquor. Louis Merlo, a witness for the state, being interrogated as to quarrels between the decedent and the defendant, was asked through an interpreter and answered as follows:

"Ask him what they quarreled about?"

Ans. "Every time Rosie drank there was quarrels."

Ques. "Every time Rosie drank there was quarreling?"

Ans. "Yes, sir."

When Letizia Partipillo, a witness for the state, was testifying and was being cross-examined by the attorney for the defense, the following questions were given and the following answers made. Referring to the deceased, the following question was asked:

"Never drank?"

Ans. "We used to drink at the table a little wine but he was never drunk here or in the old country."

Ques. "And Rosie was always drunk?"

Ans. "Yes, sir, especially when she would go to Beaverton or Portland, or to her father's house she would never come home until half-past 1 or 2 o'clock after midnight."

Ques. "And your father never got drunk?"

There was no objection to this testimony, and it is referred to as an introduction or foundation for some of the other evidence in regard to the use of intoxicating liquor by the defendant.

The defense was that the killing was done in self-defense. Upon the trial of the case, the state called as a witness, one Luigi Beggi, who testified that he ate his meals with defendant and her husband; that the defendant and the decedent used to quarrel; that he

did not know who started the quarrel. The witness was then asked by the district attorney:

"Q. Do I understand you to say that you don't know which one generally started the quarrel and when they quarreled?

"A. No.

"Q. You remember of being in the grand jury room, don't you?

"A. Yes, sir.

"Q. When this case was being investigated, you remember that time?

"A. Yes, sir.

"Q. And the grand jury and myself being present, didn't you at that time and place in the first part of November, I think it was, make this statement?

"A. Yes, sir, I know it.

"Q. All the time they had troubles, Rosa all the time started, she started first. Sometimes Joe run outside sometimes. She drink too much."

The defendant by her attorney objected as follows:

"I object to that as being apparently and plainly an attempt to impeach their own witness," and added: "He has not testified to anything against the prosecution and he has simply failed to testify as strongly as was wanted and I do not think they can impeach their witness that way."

These objections were overruled and exception allowed, and the examination by the district attorney proceeded.

"Q. Didn't you say at that time and place?

"A. I think so.

"Q. You say you said that?

"A. Yes, sir.

"Q. Was it true? (This question was again objected to, but the objection was overruled and the witness answered), 'I guess so.'

"Q. Was it not true?

"A. Well, that is true."

It will be seen that the method of examination pursued with the witness served apparently to refresh his memory. No hearsay nor unsworn statements were admitted. Section 861, L. O. L., provides:

"The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in Section 864."

1. The state called the witness and under this section it was entitled, when the district attorney was surprised by the unexpected and unfavorable testimony, to call the attention of the witness to prior statements which were inconsistent with his present sworn testimony, together with the circumstances of time and place and persons present according to Section 864, L. O. L., in order to refresh the recollection of the witness and induce him to correct his testimony or explain the apparent inconsistency, and to ask the witness if he made such previous statements. Whether or not the examination of the witness was strictly within the rule in the cases of: *Langford* v. *Jones,* 18 Or. 307, 326 (22 Pac. 1064); *State* v. *Steeves,* 29 Or. 85, 104 (43 Pac. 947); *State* v. *Yee Gueng,* 57 Or. 509, 512 (112 Pac. 424), there was no attempt to show the bad character of the witness. No unsworn or prior declarations of the witness were admitted. No substantive evidence was received in that manner. These are the shoals to steer clear of in such matters: *Wigan* v. *La Follett,* 84 Or. 488, 496 (165 Pac. 579). None of the fatal results followed. It served as in the nature of a leading question to the witness tending to bring out the truth: *State* v. *Deal,* 43 Or. 17 (70 Pac. 534). There was no reversible error in permitting such examination.

2–5. The most serious contention of the defendant is that: The state was allowed on rebuttal, to offer evidence that the defendant had been guilty of an independent crime. Luigi Beggi was a witness for the state. He was recalled as a witness on rebuttal, and testified through an interpreter, as follows:

"Q. Ask him if he knows anything about the time Rosa got a revolver and was going to kill his uncle?"

The defendant objected to this as irrelevant, immaterial, and not in rebuttal of any issue in this case, the objection was overruled and the exception allowed and the witness answered, "Yes, sir."

"Q. Ask him to tell the jury about that.

"A. Yes, Davy's brother was cleaning land, and Rosa came up and told him, Rosa said if he would not take back the words he said she would shoot him."

There is nothing in this testimony or in the objection thereto, to attract the attention of the trial court to the fact that it was the intention of the district attorney to elicit evidence pertaining to any other crime than that charged in the indictment, or that the witness referred to any threat made by the defendant except against the decedent. In other words, it does not appear that the decedent, Joe Merlo, was not an uncle, or a so-called uncle, of the witness, Luigi Beggi. The testimony interpreted from Italian to English is difficult to understand. As near as we can tell from a careful examination of the evidence, the witness Beggi understood that the question objected to referred to Rosa Merlo's uncle although the gender does not so indicate. It would seem as though the mind of the trial court should have been directed to the objection to the evidence as now made. The objection plainly goes to the introduction of the evidence upon rebuttal:

See *State* v. *Goddard,* 69 Or. 73 (133 Pac. 90, 138 Pac. 243, Ann. Cas. 1916A, 146); *Hoag* v. *Washington-Oregon Corp.,* 75 Or. 588 (144 Pac. 574, 147 Pac. 756, 760, par. 6); *Filkins* v. *Portland Lumber Co.,* 71 Or. 249 (142 Pac. 578, 579); *Shandrew* v. *Chicago, St. P. M. & O. R. Co.,* 142 Fed. 320 (73 C. C. A. 430). The specific objection to evidence that it was not proper rebuttal waives any other objection and no other objection should be considered on appeal: *Ladd & Bush* v. *Sears,* 9 Or. 244; *Hildebrand* v. *United Artisans,* 50 Or. 159, 166 (91 Pac. 542). It would seem unnecessary to observe that before this court can review a ruling of the trial court, such ruling must be made. To suggest the application of the principle is sufficient. It is also complained by defendant that the state was allowed to introduce evidence of other threats by the defendant on rebuttal. The state called in rebuttal one Mike Partipillo, who testified as to threats made by defendant to kill the decedent.

The witness Partipillo testified that upon an occasion at the Good Samaritan Hospital when other people were present he heard Rosa Merlo make certain threats against her husband. These threats had already been testified to by other people who were there at the hospital at the time, on the state's direct case. Partipillo's testimony was merely cumulative. He had been subpoenaed and it was his duty to have been in court at a time when his testimony could have been taken while the state was engaged in putting in its case in chief, but he was not present. He did not arrive in court until the prosecution was engaged in putting in its rebuttal. His testimony was objected to upon the ground that it was not proper rebuttal. When this objection was made the district attorney stated to the court:

"We intended to put this witness on in the direct case but he didn't get out on the train and we rested our case without him."

Upon the statement of the district attorney, the objection was overruled and the court allowed his testimony to be taken.

Mrs. Martha Hansen, a witness for the state, testified in effect that she had met the defendant getting off the train at the station of Santa Rosa a short time before the murder and that at the time the defendant got off she appeared to be in an intoxicated condition. The objection of the testimony is as follows:

"Object as irrelevant, immaterial and incompetent and not proper rebuttal, and the witness has not shown sufficient qualifications to be able to testify."

This is practically the same objection as that made when Beggi was recalled. These objections can only be considered on the ground that it is not proper rebuttal. Therefore, all of this testimony introduced upon rebuttal may be considered at the same time. The order of the introduction of the evidence is within the sound discretion of the trial court. Section 1538, L. O. L., provides:

"Neither a departure from the form or mode prescribed by this Code, in respect to any pleadings or proceedings, nor any error or mistake therein, renders it invalid, unless it have actually prejudiced the defendant, or tend to his prejudice in respect to a substantial right."

Under this section a deviation from the mode prescribed by the Code would not be a ground for a reversal unless it appear that the substantial rights of the defendant have been prejudiced: *State* v. *Remington,* 50 Or. 99, 102 (91 Pac. 473); *State* v. *Walton,* 50 Or.

142, 152 (91 Pac. 490, 13 L. R. A. (N. S.) 811); *State* v. *Gulliford*, 76 Or. 231 (148 Pac. 876); Article VII, Section 3, of the Constitution.

6. The permission for recalling the witness Beggi to the stand and receiving the testimony of the witnesses Partipillo and Hansen were matters within the sound discretion of the trial court. And in the absence of an abuse of such discretion, we do not feel authorized to disturb the ruling: Section 862, L. O. L.; *State* v. *Robinson*, 32 Or. 43, 51 (48 Pac. 357); *State* v. *Isenhart*, 32 Or. 170, 173 (52 Pac. 569); *State* v. *Goff*, 71 Or. 352 (142 Pac. 564).

7. Error is predicated upon the instruction of the court to the jury that, "a witness shown to be false in one part of his testimony is to be distrusted in others." Section 868, L. O. L., subdivision 3, requires the court to instruct the jury on all proper occasions:

"That a witness false in one part of his testimony is to be distrusted in others."

It is not necessary that the court should add the word "willfully" to the language of the statute. The word "falsely" as used in the statute, providing that if a witness is found to have sworn falsely in any material part of his testimony he is to be distrusted in others, is not of the same import as mistakenly, and the phrase as used in the statute is of the same meaning as though the word "willfully" were used: *State* v. *Meyers*, 59 Or. 537, 545 (117 Pac. 818); *State* v. *Goff*, 71 Or. 352, 364 (142 Pac. 564); *People* v. *Righetti*, 66 Cal. 184 (4 Pac. 1063, 1185). There was no error in giving this charge in the language of the Code.

8. An extended examination of the testimony is necessary in order to determine whether or not the exceptions taken upon the trial of the cause and now assigned as errors, constitute sufficient ground for a

reversal of the case. After such an examination, and waiving the form and substance of the objection as to evidence of an independent crime, we are of the opinion that the judgment of the lower court should be affirmed; that a remand of the case and a retrial thereof, upon substantially the same testimony would produce the same result. There can be no question but that the amendment of Article VII of the Constitution in 1910 changed, or at least accentuated the law as it stood before in regard to prejudicial errors, in favor of an affirmance of a judgment, unless actual prejudicial error appears.

Finding no reversible error in the record, the judgment of the lower court is affirmed. AFFIRMED.

McBRIDE, C. J., and MOORE and HARRIS, JJ., concur.

Reversed and remanded on rehearing July 1, 1919.

ON REHEARING.

(182 Pac. 153.)

On petition for rehearing.

In Banc.

Rosa Reghitto Merlo shot and killed her husband Joseph Merlo on October 4, 1915. She was convicted of manslaughter upon an indictment charging her with murder in the second degree, and she appealed from the judgment pronounced by the court.

Joseph Merlo came from Italy to this country in March, 1907, and on June 29th following, he and the defendant, Rosa Reghitto, who is also an Italian, were married. At the time of the marriage she was about

30 years of age. She says that prior to the wedding he told her that he was 42 years of age; but she claims that she afterwards ascertained that he was much older. He had four children, by a previous marriage, living in Italy. Joseph sent for his children and they came to this country in 1909 and made their home with their father and stepmother. Subsequently two of the daughters married and became established in homes of their own. Mary Guiso and Letizia Partipillo are the married daughters. Louisa Merlo is the third daughter and Louie Merlo is the son; these two children continued to live with their father and stepmother until the date of the homicide. Two children were born to the defendant and her husband. David Reghitto is the father of Rosa Merlo. Pietro Debenedetti who, for the sake of brevity, will be called Pete, was an employee of the Merlos.

The defendant and her husband were truck farmers, and they lived upon a tract of several acres of land which was owned by the defendant and is located near a railway station called Santa Rosa. David Reghitto lived near Beaverton, a town about two and a half or three miles distant from Santa Rosa.

Joseph Merlo took a wagonload of vegetables to Portland and disposed of them during the morning of October 4, 1915. The defendant went to Portland that morning on the train and arrived there "a little after 9." She says that soon after her arrival she met her husband and that, upon noticing that she looked pale and sick, "he suggested that they go to Garbarino's and take something and you will feel better"; and that they did go to Garbarino's, where she took some Fernet bitters. David Reghitto also went to Portland on the train on the morning of October 4th and arrived

there about 11 A. M. At about 1:20 P. M. the defendant in company with her father boarded an Oregon electric car in Portland and reached Beaverton about 1:42 P. M. They then went to David Reghitto's home where, according to the testimony of the defendant and her father, she drank only a part of a glass of wine. At 4:07 P. M. the defendant boarded a car at Beaverton and arrived at Santa Rosa five or seven minutes afterwards.

Joseph Merlo reached home about 1 P. M. Three hunters came to the Merlo place early that morning and they were eating their lunch when Merlo arrived home with his wagon. Each of these hunters testified that Merlo was intoxicated when he returned home. The defendant says that when she came from the depot Louisa said that she thought that her father "has got some drink" and that "when he came home from Portland he was quarreling mad." However, Louisa denies making this statement and asserts that her father was not under the influence of liquor. Pete likewise says that the decedent was sober when he came home.

In its case in chief, the state called Letizia Partipillo, Mary Guiso, Louisa and Louie, the four children of the decedent, Pete and three other witnesses who testified about frequent quarrels between the defendant and her husband and that the quarrels were always brought on by the defendant. When asked what they quarreled about, Louie Merlo stated: "Every time Rosie drank there was quarrels." A number of witnesses swore that on various occasions they heard the defendant threaten to kill the decedent; some of these threats mentioned by the witnesses were made in the presence of the decedent while others were not made in his presence.

The defendant, in her case in chief, presented one witness who told about the defendant and decedent coming to the witness' office in Portland and that during an ensuing quarrel between the defendant and her husband the latter "got awful mad at her" and he picked up a heavy cuspidor "and wanted to hit her with it." Another witness testified that on Easter Sunday in 1915 he heard the decedent call the defendant a prostitute. Three other witnesses narrated instances calculated to indicate that the decedent was jealous and that he was an aggressive participant in the quarrels with his wife. Evidence in behalf of the defendant is to the effect that upon three occasions the defendant left her husband and talked about procuring a divorce; on one of these occasions she returned to him only upon his promise to do better. The defendant said that three days after their marriage she and her husband quarreled; that he was jealous, cranky and mean; that he called her "all kinds of dirty names"; that he threatened to kill her many times; that he attempted to kill her four years before the homicide; and that she was afraid of him. In addition to what the defendant said about the representation made by her husband concerning his age, she stated that before their marriage he "told me he leave lots of money in the old country and property; and next he said when I get married I don't get anything."

Louisa Merlo testified that when her father came into the house, after returning from Portland on October 4th, she prepared a meal for him, and that after eating "he went upstairs to bed." According to the testimony of the defendant, when she reached the house she met and talked with Louisa and then went upstairs and changed her clothes. Her husband was lying on the bed asleep but awakened while she was

changing her clothes. She testified that he then asked her what time it was and that when she told him that "it was about half-past 4" and that she had just come home he accused her of "looking around all day with your friend in Portland," applied an opprobrious name to her, tried to catch her and "he said to-day I am going to fix you." The defendant says that she ran downstairs and out through the back door into the yard. According to the version given by the defendant, both Louisa and Louie were in the yard and endeavored to aid their father by attempting to catch the defendant, and that she picked up a stick and kept off the children. The defendant says that Louisa soon went "down" to the cabbage-patch where Pete was working and Louie went either to the barn or to the tomato-house. Louie claims that he was in the tomato-house all the time and did not witness or participate in the quarrel. Louisa says that while on her way from the tomato-house to the cabbage-patch with some boxes for Pete and when at a point some little distance from the house she saw her father and the defendant outside of the house and heard the defendant say: "If anybody comes near me I hit them on the head." Louisa insists that she went on down to the cabbage-patch and that she neither participated in the quarrel nor even saw or heard any more of it than as already stated. The defendant contends that after Louisa had gone to the cabbage-patch and after Louie had gone to the barn or to the tomato-house the decedent said: "To-day I want to get rid of you and your father and mother and every Reghitto that is born the same place that I am." The defendant says she then started to run down to the cabbage-patch where Pete and Louisa were but her husband soon caught her and "he threw me on the porch like an old shoe." The defendant

claims that she then fled through the back door and after locking it ran upstairs and took refuge in her bedroom and locked the only door to that room. The defendant contends that her husband entered the house through a window, came upstairs, broke open the bedroom door and that in order to defend her own life she shot him. The decedent was shot four times; twice in one arm and twice in the body. As we read the record it is admitted by all that Louisa and Pete were in the cabbage-patch when the shots were fired. Louie insists that he was in the tomato-house when he heard the shots; the defendant says, however, that he was at but outside the house and was attempting to persuade his father not to break into the bedroom. Upon hearing the shots Louisa and Pete ran to the house and Louie says that he likewise ran to the house; and they all stated that when they reached the house they found Joseph Merlo lying on the floor in the bedroom. REVERSED AND REMANDED.

For appellant there was a brief over the names of *Messrs. Huston & Huston,* and *Mr. Harry T. Bagley,* with oral arguments by *Mr. Samuel B. Huston* and *Mr. Bagley.*

For the State there was a brief and an oral argument by *Mr. Edmund B. Tongue,* District Attorney.

HARRIS, J.—When presenting its case in chief the state called Luigi Beggi as one of its witnesses. After having explained that he had been acquainted with and had worked for Rosa and Joseph Merlo and that "they used to quarrel" he was asked: "Do you know what they quarreled about?" and his answer was "No." The witness was next asked: "Who seemed to start

the quarrel?" and he answered thus: "Well, I don't know, they started it together; I don't know." Subsequent questions asked by the district attorney and answers given by the witness were as follows:

"Q. Do I understand you to say that you don't know which one generally started the quarrel when they quarreled?

"A. No.

"Q. You remember of being in the grand jury room, don't you?

"A. Yes, sir.

"Q. When this case was being investigated? You remember that time?

"A. Yes, sir.

"Q. And the grand jury and myself being present, didn't you at that time and place, in the first part of November, I think it was, make this statement—

"A. Yes; I know it—

"Q. 'All the time they had trouble, Rosie all the time start it, she start it first sometimes Joe run away outside sometimes, she drink too much.'

"Q. Didn't you say at that time and place—

"A. I think so.

"Q. You think you said that?

"A. Yes, sir.

"Q. Was it true?

"A. I guess so—

"Q. Was it or not true?

"A. Well, that is true."

9. The defendant objected to the questions last above quoted "as being apparently and plainly an attempt to impeach their own witness." Our statute, Section 861, L. O. L., does not permit the party producing a witness to impeach his credit by evidence of bad character, but the party producing a witness may show that such witness "has made at other times statements inconsistent with his present testimony." That part of Section 861 which prohibits a party from

impeaching his own witness by evidence of bad character is simply declaratory of a common-law rule; and this, like most rules, is based upon a reason. In theory, the ultimate object of every lawsuit is to ascertain the truth. Every person participating in the trial of a lawsuit is supposed to assist in ascertaining the truth so that justice can be administered. The party producing a witness is presumed to know the character of that witness; and since a party, like all others concerned in the trial, is at least supposed to aid in discovering the truth, he is deemed to represent to the court that such witness is worthy of credit or at least is not so infamous as to be wholly unworthy of it. It would be a perversion of the judicial function if an unscrupulous litigant could produce a witness, whom he knows to be unworthy of belief, and then gamble upon the kind of testimony to be given by the witness, with the accompanying right to accept any benefit that might come from favorable testimony taken from a foul and polluted source or to reject and to destroy the testimony, if unfavorable, by showing that the witness is unworthy of belief. A party who produces a witness of bad character cannot show the bad character of that witness and thus relieve himself from the injurious effects of any unfavorable testimony given by such witness. The element of surprise is not supposed to be present, and hence a party must accept the consequences which he himself has brought upon himself by producing a witness of bad character.

Professor Wigmore says that the "conception, that a party calling a witness must not even discredit him, was not enforced as a rule of law until a comparatively late period." (2 Wigmore on Evidence, § 896.) This author gives an interesting account of the origin and growth of the rule and says that the enforcement of

it in the trial of Warren Hastings, in 1788, "seems to have been the immediate cause of its general currency." The rigor of the rule, when applied to prior self-contradictions, has been slowly but surely relaxed during the last century, not only by force of statutes but also by the influence of judicial decisions. Professor Wigmore's treatise on Evidence contains an exhaustive narrative of the origin, growth and establishment of the rule and the processes which in most jurisdictions have brought about a relaxation of the doctrine when applied to prior self-contradictions: Section 896 et seq; Section 1017 et seq. This process of relaxation has naturally resulted in a multitude of judicial decisions. A comparatively few of these decisions have attempted to stem the current of judicial opinion by refusing to relax at all; some have relaxed only slightly; while still others have relaxed much. Whether relaxing much or little, the courts have not always assigned the same reasons for their conclusions. These multitudinous decisions, appearing as they ofttimes do in varying and even contradictory forms and based as they frequently are on different reasons, must always be read in the light of the genesis and subsequent development of the rule now under discussion.

Judicial decisions dealing with prior self-contradictions may be divided into three general classes: (1) Those which prohibit the use of prior self-contradictions for any purpose; (2) those which permit a party to direct the attention of his own witness to a prior self-contradiction, but at the same time refuse to permit proof of such prior inconsistent statement even though the witness denies having made the statement; and (3) those which permit a party to direct the attention of his own witness to a prior inconsistent state-

ment and also allow proof of such prior statement if the witness denies having made the statement. The reported precedents belonging to the second class assign different reasons for their conclusion. Some in general terms declare that a question containing reference to a prior self-contradiction is competent to show surprise; and others in equally general terms say that the question is proper for the purpose of refreshing the recollection of the witness. The cases properly assignable to the third class usually proceed upon the theory that it is competent to prove a prior self-contradictory statement for the purpose of neutralizing the prejudicial testimony of a party's own witness in the event the witness fails to remember or denies having made the prior statement. Cases found in the second class permit a party to take but a single step; for he can do no more than ask the question and whether the witness admits or denies having made the prior statement, the answer concludes the party. If the cases in this class are resolved to their final analysis it will be found that they exclude rather than include the element of impeachment as the primary basic idea; for the avowed purpose of the doctrine of these cases is to show surprise or to refresh the recollection of the witness. Cases belonging to the third class permit a party to take two steps if necessary: (1) To ask the question; and (2) to prove the utterance of the prior inconsistent statement if the witness denies having made it. In some jurisdictions the right to impeach a party's own witness is made absolute, either by judicial decision or by statute; while in others, by force of judicial declaration or legislative fiat, the right is made dependent upon the discretion of the trial judge.

A statute in this jurisdiction confers the right and fixes the conditions under which a party may impeach his own witness by prior inconsistent statements. Section 861, L. O. L., reads as follows:

"The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in Section 864."

10. Although the language of Section 861, L. O. L., is broad and comprehensive, nevertheless a party cannot assert the right to discredit his own witness by the use of prior inconsistent statements unless such witness gives testimony which relates to a material matter and is prejudicial to the party calling him. If the witness merely fails to testify as he was expected to do, or fails to testify as strongly as was expected, or gives testimony which is favorable to neither party, and does not give testimony prejudicial to the party calling him, then the party producing the witness cannot impeach him by showing inconsistent statements. This is the rule which prevails in this as well as in all jurisdictions coming within the third class: *State* v. *Steeves,* 29 Or. 85, 104 (43 Pac. 947); *State* v. *Bartmess,* 33 Or. 110, 113 (54 Pac. 167); *State* v. *Yee Gueng,* 57 Or. 509 (112 Pac. 424); *State* v. *Jennings,* 48 Or. 483, 488 (87 Pac. 524, 89 Pac. 421); *Woodburn* v. *Aplin,* 64 Or. 610, 622 (131 Pac. 516); *Reimers* v. *Brennan,* 84 Or. 53, 57 (164 Pac. 552); *Wigan* v. *La Follett,* 84 Or. 488, 496 (165 Pac. 579); *People* v. *Godwin,* 123 Cal. 374 (55 Pac. 1059); *Sturgis* v. *State,* 2 Okl. Cr. 362 (102 Pac. 57); *Culpepper* v. *State,* 4 Okl. Cr. 103 (111 Pac. 679, 140 Am. St. Rep. 668, 31 L. R. A.

(N. S.) 1166; *Andrews* v. *State*, 64 Tex. Crim. Rep. 2 (141 S. W. 220, 42 L. R. A. (N. S.) 747).

11. Stated broadly, since a party is supposed to know the character of his own witness and having such knowledge should not be surprised at any testimony given by a witness of bad character, a party is not permitted to show the bad character of his own witness and must accept the consequences of his own fault in calling such a witness; but where a presumably truthful person makes a statement and afterwards as a witness makes an inconsistent statement to the surprise and prejudice of the party calling him then the party calling the witness is not in fault and should be permitted to repair the damage.

12. Applying the established rule to the record presented here it cannot be said that the testimony of Luigi Beggi was affirmatively prejudicial to the state. He did not testify as strongly as was expected by the district attorney; but he gave no testimony against the state; and hence the state could not have properly called any of the grand jurors to testify about what was said by Luigi Beggi in the grand jury room. If Beggi had stated that the decedent always or even sometimes started the quarrels the situation would have been different. The essential facts in *State* v. *McDaniel*, 39 Or. 161, 181 (65 Pac. 520), bear some resemblance to the record of Luigi Beggi's testimony; but notwithstanding the similarity in the controlling facts and the ruling made in *State* v. *McDaniel* our conclusion is that the testimony given by Beggi was not such as would have authorized the state to impeach him by evidence of prior inconsistent statements.

13. However, no witness was called for the purpose of impeaching Luigi Beggi. The district attorney did not tell the court that the questions were being asked

for the purpose of laying the ground for impeachment. Indeed, counsel for the state made no statement whatever concerning the purpose of the questions; and the court said nothing, except to overrule the objections. It is true that the defendant objected, claiming that the plaintiff was attempting to impeach its witness; and yet the objection made by the defendant did not necessarily alone and of itself fix and limit the purpose of the testimony. The defendant does not contend that it was incompetent for Luigi Beggi to testify: "All the time they had trouble, Rosie all the time start it, she start it first, sometimes Joe run away outside, sometimes she drink too much"; and yet in the final analysis the witness did that and nothing more. It is true that the testimony was not given until the attention of the witness was first called to a statement made by him in the presence of the grand jury; but it is also true that when his recollection was refreshed, he remembered that he had made the statement and he then affirmed that the statement was true. If it be conceded that the ultimate answer was competent, then the defendant can have no just ground for complaint unless it can be said that the method pursued was objectionable. The testimony finally given was highly important to the state. A mere reading of the questions and answers already quoted at once suggests that the witness may have been an unwilling witness; and it may be that in addition to the suggestion carried by the paper record the appearance and conduct of the witness made it plain to the trial court that Luigi Beggi was a reluctant witness. Moreover, this same witness afterwards testified that on the night of the shooting David Reghitto told him that he would have to give certain testimony and "if you don't I fix you." Here then was a witness whom the court apparently

treated as an unwilling witness and there is much in the record which would seem to justify what appears to have been the opinion of the court. If Luigi Beggi is viewed as a reluctant witness the next question for decision is whether the substantial rights of the defendant were affected. Section 1626, L. O. L., provides that:

"After hearing the appeal the court must give judgment, without regard to the decision of questions which were in the discretion of the court below, or to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Our Code expressly provides that "under special circumstances, making it appear that the interests of justice require it" the court may in the exercise of a sound discretion permit leading questions to be asked on direct examination: Section 858, L. O. L.; *State* v. *Ogden,* 39 Or. 195, 202 (65 Pac. 449).

If it be assumed that Luigi Beggi was an unwilling witness and if the questions were asked for the purpose of refreshing the recollection of this unwilling witness, then the ruling of the trial court finds support in our own precedents as well as in parallel cases reported in other jurisdictions: *Langford* v. *Jones,* 18 Or. 307, 326 (22 Pac. 1064); *State* v. *Bartmess,* 33 Or. 110 (54 Pac. 167); *State* v. *McDaniel,* 39 Or. 161, 181 (65 Pac. 520); *People* v. *Sherman,* 133 N. Y. 349, 356 (31 N. E. 107); *Arnold* v. *State,* 5 Wyo. 439, 447 (40 Pac. 967); *Territory* v. *Livingston,* 13 N. M. 318 (84 Pac. 1021); *People* v. *Kelly,* 113 N. Y. 647, 651 (21 N. E. 122); *Cady Lumber Co.* v. *Wilson Steam Boiler Co.,* 80 Neb. 607, 610 (114 N. W. 774); *Smith* v. *State,* 46 Tex. Cr. Rep. 267 (81 S. W. 936, 108 Am. St. Rep. 991, 1001). See, also, *Sturgis* v. *State,* 2 Okl. Cr. App. 362 (102 Pac. 57, 71); *Stanley* v. *Stanley,* 112

Ind. 143, 145 (13 N. E. 261); *Thompson* v. *State,* 99 Ala. 173, 175 (13 South. 753); *People* v. *O'Neill,* 107 Mich. 556, 560 (65 N. W. 540); *Battishill* v. *Humphreys,* 64 Mich. 514, 518 (38 N. W. 581); *State* v. *Cummins,* 76 Iowa, 133, 135 (40 N. W. 124); *People* v. *Lukoszus,* 242 Ill. 101 (89 N. E. 749); *Bullard* v. *Pearsall,* 53 N. Y. 230. In view of the apparent reluctance of Luigi Beggi to testify and in view of the answer finally given by the witness and the special circumstances surrounding the examination of the witness, the defendant is not entitled to a reversal of the judgment on account of the questions asked Luigi Beggi.

14. However, since a party cannot use the prior inconsistent statement of his own witness as substantive testimony, the court should always be careful to protect the rights of the opposing party, and, whenever permitting a party to refresh the recollection of his own witness by directing attention to a prior inconsistent statement, the court should inform the jurors of the limited use to be made of the prior statement and should advise them that the prior statement cannot be considered as substantive testimony.

15. The defendant called a number of witnesses who testified that they had never seen the defendant intoxicated or under the influence of liquor. Frank Stroud was one of such witnesses. On his direct examination he stated that he had resided in Beaverton about eight years; that he had been acquainted with the defendant seven or eight years and had seen her frequently during that time; that he had seen her "a great many times in Beaverton and out of Beaverton a few times"; that he had been "out to her place" a number of times and that he had never seen her intoxicated or under the influence of liquor. On cross-

examination the witness was asked the following question: "In fact she had a reputation down there of getting drunk didn't she?" The defendant objected to the question on the ground that it was not proper cross-examination and was hearsay. The court overruled the objection and thereupon the district attorney repeated the question as follows: "She has got a reputation down there for getting drunk hasn't she?" and the witness answered thus: "I could not answer that question 'yes.' I don't think so." Again the witness was asked on cross-examination, "Isn't it a matter of general neighborhood talk down there that Rosie gets drunk?" The defendant again objected and upon the objection being overruled the witness answered thus: "I can't answer that question. I don't think so." Assuming without deciding that the questions were objectionable nevertheless it is plain that the answers given by the witness in no wise prejudiced the defendant. It is true that subsequently the witness testified that he had heard that the defendant drank and that he had heard "that she gets drunk," but there was no objection made to the questions calling for those answers.

16. David Reghitto was called as a witness for the defendant and, on direct examination, testified that he had "been over to Rosie's home quite often," and, indeed, as often as once or twice a week during the spring and summer time; that Joe "was afraid of nobody"; that he had been at the home of the Merlos at "different times" when "Rosie and her husband were quarreling"; that he had heard Joe call Rosie such names as "cow," "prostitute" and "pig"; that on one occasion the defendant left her husband "and was going to get the sheriff to get her children" and that "Joe came to Beaverton to get Rosie to come

back'' and that Joe came to see the witness; that the witness told Joe that he did not feel like attempting to persuade Rosie to return because he had persuaded her on two previous occasions not to secure a divorce; that Joe said ''if she come back on the place and everything was all right and they make money and he would treat her nice and respect her''; and that Joe ''begged and was nice and sweet as he can be, and talked to my daughter to come back.'' On cross-examination this witness stated that Joe ''was a man that was very jealous.'' When asked on further cross-examination to tell what the trouble was between Joe and Rosie the witness explained: ''they don't get along good. All the time he scolded bad.'' David Reghitto also stated on cross-examination that Joe and Rosie did not get along because ''he was a rough man, and a bad man; and no education; an Italian; a low-class Italian.'' The witness was then asked by the district attorney the following question:

''Didn't the whole row start over the fact he told Rosie before he was married that he had a lot of money?'' ''Didn't he tell Rosie before he was married that he had a lot of money?'' ''And when Rosie found out that he didn't have any money after they were married they had trouble from that time on didn't they?''

In substance, ''No'' was the answer to each of the quoted questions. Continuing with the cross-examination the district attorney afterwards asked the following questions and the witness gave the following answers:

''Q. Didn't you at that time tell Mr. Holsheimer that you had never seen Rosie and Joe quarrel?

''A. No; I didn't speak to him; I just go around quick to find Rosie.

"Q. And at that time and place didn't you say to Mr. Holsheimer that Joe had come from the old country and he boasted of being a rich man?

"A. No.

"Q. And he didn't have anything and that was the cause of most of the troubles or quarrels?

"Q. Did you tell Mr. Holsheimer that or words to that effect?

"A. I never told Mr. Holsheimer.

"Q. Didn't you tell Holsheimer that at that time?

"A. No, sir. You know yourself that—"

Subsequently, George H. Holsheimer was called as a witness for the state in rebuttal, and he stated that at the time and place mentioned in the questions submitted to David Reghitto the latter stated to the witness "that Joe and Rosie could not get along, but they quarreled all the time, but that he never saw them quarrel"; and "that Joe came from the old country and boasted of being a rich man, but he didn't have anything and that was the cause of most of the quarrels."

The defendant contends that she made no attempt to show, by the witness David Reghitto, the cause of the quarrels, and that therefore it was not proper cross-examination for the state to inquire into the cause of the quarrels. The defendant admitted that she killed her husband; and hence as stated by the defendant in her printed brief:

"The great issue in the case of course, is as to whether or not the killing of the deceased by the defendant was justifiable."

No person now living besides the defendant herself was present at the shooting. No person except Louisa and possibly Louie saw Rosa or Joe, prior to the shooting, at any time after the defendant arrived at the

house that evening. It is true that the defendant says that Louie was at the house, but he denies it; and consequently the prosecution was obliged to rely upon circumstances to support its contention. The state had introduced evidence of threats made by Rosa; both the plaintiff and the defendant introduced witnesses who testified about many quarrels; the defendant had already appeared as a witness in her own behalf and testified about the representation made by Joe concerning his age and that he had told her prior to the marriage that "he had lots of money," but that she found out that he did not have any money. It is admitted that the defendant and her husband quarreled frequently; and consequently the fact that Joe or the fact that Rosa, as the case may be, usually brought about the quarrels would be a very persuasive circumstance in determining whether the killing was criminal as argued by the prosecution, or justifiable as contended by the accused. Before calling David Reghitto, the defendant had told her own story and she as well as other witnesses had given testimony from which it could be argued that the decedent was either alone responsible for the quarrels or at least was an aggressive participant in the quarrels. Indeed, the testimony given by David Reghitto on direct examination, if believed by the jury, furnished a substantial foundation for a finding that Joe and not Rosa was responsible for the quarrels; and while the defendant did not in terms ask the witness to state the cause of the quarrels the questions submitted to him and the answers given by him did in effect say to the jury that the quarrels were caused by Joe illtreating Rosa; and, therefore, the district attorney was well within the limits of Section 860, L. O. L., when he asked the witness whether the quarrels began when Rosa learned that

Joe did not have "lots of money." The matter inquired about on cross-examination was obviously connected with matter stated by the witness in his direct examination and the cross-examination was designed to explain and qualify the direct examination: *Speer* v. *Smith*, 83 Or. 571, 575 (163 Pac. 979).

17. The defendant insists that the cross-examination of David Reghitto concerning his alleged statements to Holsheimer and the testimony of Holsheimer as to those statements was prejudicial error because it was an attempt to impeach a witness by showing contradictory statements concerning matters which were immaterial and irrelevant to the issues in the case. The general rule is that when a cross-examination elicits from a witness matter that is immaterial or wholly irrelevant to the issue the party conducting the cross-examination is concluded as to such matter and cannot impeach the credibility of the witness by showing that he has at other times made contradictory statements touching the same matter: *Josephi* v. *Furnish*, 27 Or. 260, 264 (41 Pac. 424). As already pointed out the cross-examination of David Reghitto was proper because connected with matter stated by him in his direct examination; and it is manifest that the matter inquired about on the cross-examination was material and relevant to the issue.

Among the witnesses called by the state after the defendant had completed her case in chief was Mike Partipillo, a son-in-law of the decedent, who testified about going to the Good Samaritan Hospital in May, 1915, to visit Annunziatta Merlo, a sister of the defendant, and there, in the presence of Letizia Partipillo and Annunziatta Merlo, hearing the defendant say: "Some day I am going to blow Joe's brains out." Letizia Partipillo, a daughter of the decedent, was a

witness for the prosecution in its case in chief and had testified about the threat referred to by her husband Mike Partipillo. Annunziatta Merlo was also a witness for the state in its case in chief and she had testified that the defendant said that "she would blow somebody's brains out." When the plaintiff called Mike Partipillo and requested him to tell about what occurred in the hospital the defendant objected because the testimony was not proper rebuttal. The district attorney thereupon stated to the court:

"The court has the right, rebuttal or no rebuttal, in the interest of justice, to allow the introduction of testimony that might throw any light on the case. We intended to put this witness on in the direct case but he didn't get out on the train and we rested our case without him";

—and, in the light of that statement, the court ruled that the witness could testify. Strictly speaking, the testimony was not proper rebuttal but was a part of the state's case in chief. It is not claimed that Mike Partipillo had not been subpoenaed. His evidence was cumulative only. The defendant could not have been surprised at the testimony given by Mike Partipillo because both Letizia Partipillo and Annunziatta Merlo had previously testified that he was at the hospital when the alleged threat was made. It is apparent that the plaintiff did not offer the evidence as rebuttal, but upon the contrary, recognizing that it was not proper rebuttal, the district attorney in effect requested the court to reopen the case so that this evidence could be introduced as a part of the state's case in chief. We think that we may fairly assume that the court treated the explanation of the district attorney as a request to reopen the case. Viewing the ruling of the court as a permission to reopen the state's case

in chief, it was in harmony with rather than in violation of the doctrine announced in *State* v. *Minnick*, 54 Or. 86, 95 (102 Pac. 605).

18. Mrs. Martha Hansen testified in rebuttal for the state that she was a passenger on the car which carried the defendant from Beaverton to Santa Rosa, and that in her opinion the defendant was intoxicated when she alighted from the car at Santa Rosa. In its case in chief the state offered no evidence indicating that the defendant was intoxicated on October 4th; nor did the plaintiff offer any evidence that the defendant had on that day drunk any intoxicants except the testimony of J. E. Reeves, the sheriff, who told about the defendant telling him that "she had a couple of drinks of Fernet bitters" in Garbarino's saloon with her husband and the testimony of Palmiro Reghitto, who stated that the defendant, when at her mother's house in Beaverton on the afternoon of October 4th, said: "For once she drank with her husband in Portland," and also that Rosa said "she drank twice with her father." The defendant called six witnesses who had seen her at different times while she was in Portland on October 4th and each of these witnesses stated that the defendant was not under the influence of intoxicating liquor. G. L. Thompson, another witness for the defendant, testified that she was sober when she alighted from the car at Beaverton at 1:42 P. M. and that she was not intoxicated when she departed at 4:07 P. M. Doy Gray, a witness for the defendant, talked with her "a couple of minutes" while waiting at the Beaverton depot for the 4:07 P. M. car and he saw no signs of intoxication. William E. Beydler, another witness for the defendant, saw the defendant within a few minutes after the shooting which had occurred at about 5 o'clock P. M. and he saw no evidence of intoxication.

The testimony of Mrs. Martha Hansen was probably more appropriately a part of the state's case in chief; and yet it must be apparent that the defendant was not prejudiced in the slightest degree by reason of the reception of the evidence in rebuttal instead of in chief.

19. After most of the evidence for both the state and the defendant had been introduced, the district attorney recalled Luigi Beggi in rebuttal and the following questions were asked by the state and the following answers given by the witness:

"Q. Ask him if his uncle—ask him if Davie is his uncle?

"A. No.

"Q. Ask him if he knows anything about the time Rosie got a revolver and was going to kill his uncle?

"A. Yes, sir.

"Q. Ask him to tell the jury about that?

"A. Yes; Davie's brother was cleaning land and Rosie came up and told him—Rosie said if he should not take back the words he said she would shoot him.

"Q. Ask him if she got a gun after him?

"A. I didn't see it. But he told me that she had it.

"Q. Did he see it?

"A. No, sir. My father was there.

"Q. Did Rosie tell you that?

"A. No, sir."

There is but little evidence in the record referring to the relationship of Luigi Beggi, but we do read in the transcript, however, that Rosa Merlo in her testimony refers to "Louie Beggi" as "my cousin"; and hence if "Louie Beggi" is the same person as "Luigi Beggi" there is affirmative testimony that Joseph Merlo was not an uncle of Luigi Beggi. At any rate there is not one word of evidence to indicate that Joseph Merlo was an uncle of the witness; nor is it

claimed by the state that such was in truth the relationship. The answer of the witness would affirmatively indicate that Rosie, the defendant, addressed her threat to her father's brother. Moreover, this testimony of Luigi Beggi was doubly incompetent because he did not "see it" but had only heard about it. It is plain that this testimony of Luigi Beggi about what the defendant did and said was not competent for any purpose; and when we remind ourselves that any evidence tending to show that one rather than the other was the probable aggressor on the day of the homicide would operate as an important factor in the deliberations and conclusions of the jurors, it can at once be seen that this incompetent testimony of Luigi Beggi was highly prejudicial to the substantial rights of the defendant. The reception of this incompetent evidence compels a reversal of the judgment. It is not necessary to determine the extent of the power conferred upon the Supreme Court by Article VII, Section 3 of the State Constitution, for the reason that what was said about the evidence in *State* v. *Rader,* 62 Or. 37, 41 (124 Pac. 195), is equally applicable to the record presented on this appeal. We do not find it necessary to discuss any other assignments of error because some of them are without merit and the questions involved in others will probably not occur on a retrial.

The judgment is reversed and the cause is remanded for a new trial.

BENNETT, J., Concurring in Part.—I concur in the result announced in the opinion of Mr. Justice HARRIS. I also concur with his opinion as to the grounds upon which that result was reached, and agree as to what is said in regard to the impeachment of the witness,

Luigi Beggi, and as to the general question as to whether or not a party calling a witness, who has simply testified to a negative, may impeach him by showing that he has made at other times affirmative statements, which are inconsistent with his denial of knowledge on the stand, and which, if testified to, would have been material evidence in the cause.

As I understand it, the rule is well settled in this state and generally, that a party calling a witness, who simply says, in relation to a given matter, that "I don't know" or that "I don't remember" cannot impeach his own witness by showing that he has made statements at other times, that he did know, and has related facts favorable to the cause of the party calling him.

In *Langford* v. *Jones,* 18 Or. 307, 326 (22 Pac. 1064), Chief Justice THAYER, delivering the opinion of the court, said:

"Section 838, Civil Code, permits the party introducing a witness to contradict him by other evidence, and to show that he has made at other times statements inconsistent with his present testimony; but that section does not allow the party to inquire about matters regarding which the witness *has not given any testimony, or testimony of a weak and unsatisfactory character,* and then prove his statements made at another time in reference to such matters. The intent of the provision was to allow a party producing a witness who *testifies adversely to him* regarding some matter which directly affects the merits of the case, to impeach such testimony in the manner there pointed out. The object of the section was to prevent the party from being prejudiced by the evidence of his own witness. He may, of course, call his attention to any statements he may have made at other times, for the purpose of refreshing his memory, but he has no right to ask him about his having made some statement at another time, favorable to the party's side of

the case, which the witness has given no testimony in regard to; nor, *a fortiori,* to prove what that statement was. The Code certainly did not intend to permit a party to get in testimony as a makeweight, in support of his cause of action or defense, by such a course; and that evidently is the character of the said statement. To allow a party, after calling him as a witness and failing to elicit from him any advantageous testimony, to prove that the witness at some other time and place had made statements favorable to the claim of the party, is a strange mode of securing proof. It would be a kind of evidence which I could not distinguish from hearsay. Counsel for appellant cited a number of authorities to show that such a course was not permissible; but I think that the bare statement of the proposition is a sufficient refutation of its correctness. If it were proper, a case could be made out many times by proof of what third persons had said; it would only be necessary to call the persons as witnesses and attempt to show by them the substance of the matter embraced in the statements, and having failed in that, then to prove what such persons had said at another time and place, when they were not under oath, and obtain the benefit of that as direct evidence of the fact. Such a construction would enable parties to employ as a sword what was intended as a shield. Instead of availing themselves of the benefits of the statutory rule in order to avoid the effect of damaging testimony given against them by a witness called to prove a fact in their favor, they could make use of it for the direct purpose of establishing the fact. It is enough to say that the legislature never intended by said provision of the Code to adopt any such absurdity."

This opinion was quoted with approval by Mr. Justice MOORE in *State* v. *Steeves,* 29 Or. 85 (43 Pac. 947), in a very carefully prepared opinion, in which that learned and careful Jurist adds:

"The rule appears to be well settled that a party cannot impeach his own witness by showing he had made statements inconsistent with the testimony given at the trial, unless the testimony *so given* be material and prejudicial to the interests of the party calling him."

And in *State* v. *Yee Gueng,* 57 Or. 509 (112 Pac. 424), Mr. Justice KING, delivering the opinion of the court, quotes both of the preceding cases with entire approval, and says:

"Applying the rule thus announced to the case in hand, it will be observed that the witness gave no testimony directly adverse, or prejudicial to the state. He was asked whether certain conditions existed, and the tenor of his responses was to the effect that he did not know, or could not furnish the desired information, * * it was merely testimony of a 'weak and uncertain character' such as adverted to in *Langford* v. *Jones,* and suggested in *State* v. *Steeves* * * Nor can the fact that the former statements were made under oath change the rule, for the accused in this case, although jointly indicted with Lem Woon, was not on his trial at that time, was not present when the statements were made, and had he been present would have had no opportunity to cross-examine the witness or to dispute his assertions."

This is also the rule, as I read the reports, laid down generally, and almost universally, in the decisions of the courts of other states

In *Commonwealth* v. *Welsh,* 70 Mass. (4 Gray) 535, it appears from the statement of the case, that—

"The witness testified with a great deal of reluctance, and showed a strong disposition to conceal the facts which he knew, and evaded the questions put to him by the District Attorney."

He was asked the following question:

"Q. Did you not swear before the grand jury that you did know the defendant's business, and that you did know where the defendant's shop was situated * * ?

"The district attorney assigned no reason for putting the question, and the court gave no reason for allowing it, nor was their any explanation made by court or counsel."

The court, by SHAW, Chief Justice, says:

"The evidence of what the witness testified before the grand jury ought not to have been received. It bore upon no question pertinent to the issue. It was not to neutralize the effect of evidence given by the witness against the party calling him; for the witness had given none. It could only be to disparage the witness, and show him unworthy of credit with the jury, which was inadmissible."

The Supreme Court of Kentucky in *Saylor* v. *Commonwealth* (Ky.), (33 S. W. 185, 186), says:

"Nor can a witness who fails to testify to substantive facts *be asked if he has not made statements* to others out of court, that such facts exist, for the purpose of proving that he had made such statements, as that would transform declarations made out of court, and not under the sanction of an oath, into substantive testimony.

In *Rickerson* v. *State,* 106 Ga. 391, 392 (33 S. E. 639), the prosecution was for seduction. The defendant called a witness who, upon his examination, testified that he had never had intercourse with the female in question. Counsel for the accused then offered to impeach his statement, and the court said:

"While under our statute (Civil Code, 5290) a party may impeach a witness voluntarily called by him, where he can show to the court that he has been entrapped by the witness by a previous contradictory statement, yet this rule is not applicable where the tes-

timony of the witness is not prejudicial to such party. In such case the credibility of the witness is immaterial, as he has done no damage. The mere failure of a witness to testify to facts supposed to be beneficial to the party introducing him and which were expected to be proved by him does not come within the reason or policy of the rule."

In *Nathan* v. *State*, 131 Ga. 48 (61 S. E. 994), the court approved the Rickerson case and followed the same.

To the same effect is *State* v. *Reed*, 60 Me. 550; *People* v. *Creeks*, 141 Cal. 529 (75 Pac. 101); *In re Dolbeer's Estate*, 153 Cal. 652 (96 Pac. 266, 15 Ann. Cas. 207); *Commonwealth* v. *Bavarian Bluing Co.*, 26 Ky. Law Rep. 121 (80 S. W. 772).

In 40 Cyc. 2696, the rule is stated thus:

"The mere fact that a witness has failed to testify as expected does not warrant impeaching him by proof of prior statements in conformity to what he was expected to testify; but proof of prior contradictory statements of a party's own witness is admissible only where the witness has given affirmative testimony hostile or prejudicial to the party by whom he was called; and in such case the proof must be confined to contradictions of the testimony of the witness which is injurious to the party seeking to impeach him."

Indeed, the only exceptions to the universality of this rule seem to be a few cases where the court has failed to distinguish between the materiality of the testimony actually given by the witness in the same trial in which he is sought to be impeached, and the materiality of the proposed statements made by the witness, out of court, or in some other proceedings, where the adverse party had no opportunity to cross-examine.

The only discordant note among the cases in our own state that I have been able to find is the opinion of Mr. Chief Justice BEAN in *State* v. *McDaniel*, 39 Or. 161 (65 Pac. 520). We all have great respect for the opinions of this learned and careful Jurist, but his opinion in the McDaniel case seems to have been based upon the theory that, as the facts which the witness had stated out of court, would have been material if they had been followed by his statements at the trial, the denial of knowledge in relation to such facts by the witness, would be "adverse testimony" and would entitle the party calling the witness to impeach him by contradictory statements in relation thereto, even if the actual testimony of the witness in court was purely negative. For myself, I cannot see how the opinion in the McDaniel case can possibly be reconciled with the rule in the Langford case, the Steeves case, and the case of Yee Gueng, or with the rule so universally adopted in other states.

It is well settled in this state that the party calling a witness vouches for his truthfulness and credibility: *Chance* v. *Graham*, 76 Or. 199 (148 Pac. 63); *Sabin* v. *Kyniston*, 81 Or. 358 (159 Pac. 69).

In this case the facts sought to be proved by the state from the lips of Beggi were that, in the quarrel between the defendant and the deceased, part of which he had witnessed, the defendant had "started the quarrel." As to this the witness, who was called by the state, testified that "He did not know" as to that. He then testified as follows:

"Q. Do I understand you to say that you do not know who started the quarrel when they started to quarrel?

"A. No. * *

"Q. You remember being in the grand jury room, don't you?

"A. Yes, sir.
"Q. When this case was being investigated, you remember that time?
"A. Yes, sir.
"Q. And the grand jury and myself being present, didn't you, at that time and place in the first part of November, I think it was, make the following statement: 'All the time they had trouble, yes, sir; I know it, all the time they had trouble, Rosa all the time started it, she started it first, some time Joe run away outside, some time she drink too much.' "

To this there was an objection that it was an attempt to impeach the state's own witness, which objection was overruled by the court and the district attorney was permitted to proceed as follows:

"Q. Didn't you say that at that time and place?
"A. I think so.
"Q. You think you said that?
"A. Yes, sir.
"Q. Was it true
"A. I guess so.
"Q. Was it or not true?
"A. Well, that is true."

I cannot agree that the effect of this testimony was not to impeach the witness, simply because other witnesses were not called for that purpose. Anything which tends to discredit a witness, either on account of his bias, inaccurate memory or untruthfulness, tends to impeach his testimony to that extent. It impeached Beggi, it seems to me, just as fully, to show by *his own evidence,* that he had made previous inconsistent statements, as it would to have called other witnesses to show the same contradictory statements. It would be the fact that he had made these contradictory statements, and not the manner of proving them, which would impeach the credibility of his testimony.

As to the admissibility of this testimony for the purpose of refreshing the memory of the witness, I agree that under the rule established in this state, the preliminary questions as to his testimony before the grand jury, with *proper safeguards* to prevent it being considered by the jury as substantive evidence, and *after the proper foundation had been laid, might* have been admissible, for that purpose.

But here there were no safeguards, and from the record I do not think the contradictory statements were offered or received "to refresh the memory." There was no statement of any such special or preliminary purpose, either by the district attorney or the court. The form of the question was suggestive of impeachment and was the form usually employed for laying the foundation for impeachment by other witnesses. There was *absolutely no foundation for refreshing the memory* of the witness. No suggestion that the witness had forgotten, and no attempt to show that his memory of the transaction *was fresh at the time of his testimony* before the grand jury, which must have been over a month, and probably many months—possibly even years—after these quarrels he had been testifying about. He said he had worked for the Merlos several years—"a few days each year"—and it was during these years that these quarrels occurred.

The only express provision in our statutes for refreshing the memory of a witness at all is in the case of written memoranda, and in such case it is carefully provided that it must be made, "at the time when the fact occurred or immediately thereafter, or at any other time, *when the fact was fresh in his memory*": Section 859, L. O. L.

This rule, I think, is not an arbitrary one, but is taken from the common law, and is based upon centuries of judicial experience and observation. The reason of it is just as applicable to oral statements. Indeed, the reasons for a strict rule are far greater, in the case of oral statements, and the danger to the adverse party far more imminent, for in the case of written memoranda, it does not go before the jury at all (except at the option of the party against whom it is used) and, therefore, there is no risk of the jury giving it substantive consideration, which is always so great a danger to the rights of the adverse party, in the case of oral statements. Such rule ought to be especially applicable, where the alleged statements were made before a secret tribunal like a grand jury, where the proceedings are only known to the district attorney, and the members of the grand jury who are sworn not to disclose the same; and where the defendant had no right to be present, and cannot know by what irregular means or leading or coercive questions the statements were secured.

This question was squarely before the Supreme Court of the United States in *Putnam* v. *United States*, 162 U. S. 687 (40 L. Ed. 1118, 16 Sup. Ct. Rep. 923), which was a case on all-fours with this case. There, a witness called by the government, had been asked:

"Q. Did he ever, at any time, tell you what he had done with these bonds?

"A. Not that I now recollect."

Thereupon the attorney for the government stated:

"I propose to ask this witness a leading question, because I am taken by surprise at his answer after his testimony before the grand jury, and I wish to ask him if he did not testify to certain things before the grand jury."

This was allowed over the exception of the defendant, whereupon the witness was asked:

"Q. * * Do you not recollect that you testified before the grand jury that when you discovered those bonds were gone, you went to Boston and learned that Mr. Putnam had them, and that he acknowledged to you that he had those bonds on the 3d of August? Did you not so testify before the grand jury?

"A. If it is a matter of record I suppose it is so. * *

"Q. I am asking if you did not so testify before the grand jury?

"A. If it is a matter of record, I do not dispute the record. * *

"Q. Let me refresh your recollection a little further. Did you testify before the grand jury that you said to him something about the bond, and he said, 'Mr. Dorr, I will state to you, I am not going away?'

"A. Yes, sir, I did. * *

"Q. And did he not say, 'I will get the bonds for you as soon as I can'?

"A. Yes, I can assent to that."

The court held this was error, treating the evidence as covered by exactly the same rule, as if it had been a written memorandum, the court in an opinion by Mr. Justice WHITE, now Chief Justice, saying:

"The very essence, however, of the right to thus refresh the memory of the witness, is that the matter used for that purpose be contemporaneous with the occurrences as to which the witness is called upon to testify. Indeed, the rule which allows a witness to refresh his memory by writings or memoranda, is founded solely on the reason that the law presupposes that the matters used for the purpose were reduced to writing so shortly after the occurrence, when the facts were fresh in the mind of the witness that he can, with safety, be allowed to recur to them in order to remove any weakening of the memory. * * It is well settled that memorandum are inadmissible to refresh the

memory of a witness unless reduced to writing at or shortly after the time of the transaction and while it must have been fresh in his memory."

See, also, *Commonwealth* v. *Bavarian Bluing Co.*, 26 Ky. Law Rep. 121 (80 S. W. 772); *Commonwealth* v. *Welsh*, 70 Mass. (4 Gray) 535; *Commonwealth* v. *Blood*, 77 Mass. (11 Gray) 74.

It seems to me that this is the true rule, and is in entire harmony with the rule established by our statute, and by the common law, where the attempted refreshment of memory is by a writing.

Here, as we have seen, there was no such foundation—no suggestion of a purpose to refresh the memory. The form of the question was suggestive of impeachment. I cannot resist the conclusion, that the evidence was offered and received, as substantive evidence, for the purpose of impeaching the witness, and incidentally getting before the jury in the trial court the evidence given by the witness before the grand jury, when the defendant was not present. This conclusion seems to me to be further strengthened by the manner in which the district attorney used the evidence after he had compelled the witness to admit that he had made the statements. He did not follow it up by asking, "What do you say now?" or "What is your memory now, after being refreshed, as to who did start the quarrel?" On the contrary, his form of questions was still directed toward impeachment.

"Q. Didn't you say [that] at that time and place?
"A. I think so.
"Q. Was it true?
"A. I guess so.
"Q. Was it or not true?
"A. Well, that is true."

It does not seem to me that an attorney for either party to a litigation has a right to put a witness on the stand and vouch for his credibility, and then, when the witness does not testify as strongly as he expects, to assume that he is lying, and proceed to get him in a corner and by impeachment and threats of impeachment, drive and coerce him to testify to things, as to which he now says in court that he has no knowledge; and then defend it on the theory that he had a right to refresh the memory.

The rules of evidence are for the elucidation of truth, but they are also framed to protect the parties and *to prevent the poisoning of the mind of the jury by hearsay testimony and declarations out of court.* An honest witness (and the district attorney in this case vouched for the honesty of this witness) who is trying to tell the exact truth, may, when confronted with some hasty or inaccurate statement he has previously made, find himself very much embarrassed; and if he is threatened with the disgrace of impeachment, and happens to be ignorant or timid, and unable to explain himself, may, if he is cornered close enough by repeated questions, be willing, in sheer desperation, to answer "yes" to any question, if he thinks that answer will relieve him from the distressing situation.

In *State* v. *Steeves*, 29 Or. 85 (43 Pac. 947), it is said by Mr. Justice MOORE, in relation to the introduction of such evidence, that:

"Courts should carefully guard against its abuse, by the party producing the witness."

I think, where a party desires to ask his own witness about contradictory statements, for the purpose of refreshing his memory, he should lay the proper

foundation and *state that the evidence is offered for this special purpose;* and if he does not, the presumption is that he offers it as substantive evidence, to go to the jury for the purpose of impeachment, and the adverse party has a right to so assume, and frame his objection upon that ground.

I also think, where the evidence is offered for such purpose, that the examination should stop, as to such statements, when the attention of the witness has been called thereto; and that the party calling him should not be allowed to make such hearsay statements substantive, by attempting to prove that they were true. Having refreshed the memory of the witness, he should then revert back to the original examination, and ask the witness to state the facts as he now remembers them.

In *Trammell* v. *McDade*, 29 Tex. 361, the court says:

"It is difficult to conceive of a more objectionable form of putting a question to a witness, than is present in this case. His previous deposition is set out, * * and the substance of the last interrogatory is to know *if the first answers were true* according to the recollection of the witness, at the time of giving the first answers, and the witness answers that the answers first given were true, according to his recollection at that time. The deposition was properly excluded. The witness does not propose to give his recollection at the time of testifying, except by reference to the first deposition, and his belief that his first answers were true when made."

In short, it seems clear to me that the contradictory statements in this case were offered, received and considered by the jury, for the purpose of impeachment and as substantive evidence, which was improper and prejudicial; and that the claim now, that they were

admissible to "refresh the memory," is a mere afterthought and cover for the real purpose.

In such a case the language of Judge THAYER in the Langford case is particularly applicable:

"The Code certainly did not intend to permit a party to get in testimony, as a make weight in support of his cause of action or defense, by such a course."

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5. After certain property was sold under a sewer assessment the owner sued to quiet title, claiming that the assessment was void. The court decreed that defendant had an interest by reason of the sale which would mature in the absence of redemption within three years, and the owner appealed. Pending appeal, fearing the time for redemption would expire, he paid the assessment under protest, expressly reserving all rights arising from the appeal. *Held*, the payment was not a waiver, and furnished no ground for dismissing the appeal. (Duniway v. Cellars-Murton Co., 113.)

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7. Where plaintiff elected to proceed by review for correction of errors complained of, it barred his subsequent appeal for the correction of errors of law as well as on his issues of fact; Section 605, L. O. L., making a writ of review and remedy of appeal concurrent but not cumulative, so that choice of one is a waiver of the other. (Cooper v. Bogue, 122.)

Appeal and Error—Failure to File Brief Within Time—Dismissal of Appeal.

8. Where no brief was filed by appellant within twenty days after service of copy of abstract, as required by Rule 8 (173 Pac. viii), and no reason is advanced for the delay, appeal will be dismissed on motion of respondent. (Currin v. Crown-Willamette Paper Co., 151.)

Appeal and Error—Undertaking—Service—Evidence.

9. Notice of appeal was served and filed in the Circuit Court on July 28th. On August 1st an undertaking was filed, with the certificate of the return of the sheriff indorsed thereon, to the effect that it was received on July 31st, and served on respondent August 1st, together with a copy of the notice of appeal. The sheriff while making an affidavit that he served no papers pertaining to the appeal, after service of notice of appeal on July 28th, deposed that on July

28th appellants' attorney placed in his hands some papers relating to the appeal for service, and that he immediately served the same, and that, if an undertaking was delivered to him, he served it. Affidavits of the agent of the surety on the undertaking and witnesses showed that it was signed July 28th, although it erroneously bore the date July 30th, and that it was delivered to the sheriff for service on July 28th. *Held*, that the return of service of the undertaking, being of record, was sufficient, as it was not overcome by the affidavits. (Tokay Heights Development Co. v. Hull, 159.)

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10. On a motion to dismiss defendants' appeal, a question as to their dealing with the property in suit involves the merits, and cannot be considered. (Tokay Heights Development Co. v. Hull, 159.)

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15. Trial court has no jurisdiction to extend time for filing of transcript on appeal until a notice of appeal has been served. (Schultz v. Walrad, 315.)

Appeal and Error—Service of Notice of Appeal by Mail—Affidavit on Rehearing.

16. There can be no service by mail of a notice of appeal under Section 540, L. O. L., unless appellant's attorney resides in a different place from the attorney for respondents, so that an affidavit supporting petition for rehearing on the order made dismissing the appeal for lack of service of notice of appeal, which fails to show where the notice was mailed to the attorney for respondents or the residence of appellant or his attorneys, is defective. (Schultz v. Walrad, 315.)

Appeal and Error—Notice of Appeal—Sufficiency.

17. Under Section 550, subdivision 1, L. O. L., a notice of appeal, giving name of the court and parties, date of decree, and informing respondent that appellant appeals from decree, is sufficient. (Tucker v. Nuding, 319.)

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18. Where both plaintiff and defendant rest the case and move for directed verdict, the direction of the court in that respect must be sustained if any of the evidence will support it. (Rugh v. Soleim, 329.)

Appeal and Error—Bill of Exceptions—Necessity.

19. That findings in regard to witness' fees do not support the judgment for costs and disbursements under Section 570, L. O. L., is an error of law apparent from the face of the record, reviewable in absence of a bill of exceptions. (Ogilvie v. Stackland, 352.)

Appeal and Error—Objections Below—Assignment of Error—Costs.

20. The question of excessive allowance for witnesses' mileage is raised by objection to the allowance of any fees for the witnesses named and assignment as error of the judgment for any amount for such items; the greater including the less. (Ogilvie v. Stackland, 352.)

Appeal and Error—Harmless Error—Trial Without a Jury—Admission of Incompetent Evidence.

21. In an action tried by a court without a jury, admission of irrelevant and incompetent testimony, objected to, is not prejudicial error, where no injury to the party objecting resulted therefrom. (Puffer v. Badley, 360.)

Appeal and Error—Review—Conflicting Evidence.

22. Finding by the trial court is conclusive on appeal, where there was a sharp conflict in the evidence. (Puffer v. Badley, 360.)

Appeal and Error — Review — Nonsuit — Direction of Verdict — Evidence.

23. Appellate court, in considering appeal where trial court's action in overruling motions for nonsuit and for a directed verdict is assigned as error, will assume that plaintiff's testimony is true. (Guntley v. Northern Pac. Terminal Co., 368.)

Appeal and Error—Issues in Lower Court—Defenses not Pleaded.

24. In an action by a lessee for a mine, defendant, who in framing his pleading stood entirely on denials of the allegations in plaintiff's complaint and on the single affirmative allegation that he was an innocent purchaser cannot on appeal take advantage of an affirmative allegation in the answer of the owner of the premises, from whom he had leased the mine, that the plaintiff had abandoned and forfeited his lease, the owner not appealing from a judgment in favor of plaintiff. (Grant Chrome Co. v. Marks, 443.)

Appeal and Error—Jury Findings—Review.

25. The court on appeal has no right to review the jury's findings upon the weight of the evidence. (Schneider v. Tapfer, 520.)

Appeal and Error—Verdict Based on Possibility—Reversal.

26. Evidence which merely suggests a suspicion or possibility does not bring the case within Section 3 of the amendment to Const. 1910, Article VII, providing that no fact tried by a jury shall be re-examined unless there is no evidence to support the verdict, and a verdict based on such evidence cannot be permitted to stand. (Schneider v. Tapfer, 520.)

Appeal and Error—Law of Case—Ruling on Former Appeal—Limitation.

27. Ruling on former appeal that demurrer to complaint on particular ground was not well taken is the law of the case, but its effect must be limited strictly to its extent. (Askay v. Maloney, 566.)

Appeal and Error—Appealable Orders—Opening Default.

28. An order in a suit for divorce at a term subsequent to the judgment by default opening the default is appealable by the defaulting husband, since it affects a substantial right and changes his status from that of a single to that of a married man. (Wade v. Wade, 642.)

See Courts, 2.
See Criminal Law, 7.
See Justices of the Peace, 3.

Undertaking on Appeal.

See Justices of the Peace, 1, 2, 3.

Question Raised on Appeal.

See Pleading, 9.

APPORTIONMENT.

See Partition, 6.

ARREST.

Arrest—Arrest Without Warrant—Right of Officers—Suspicion.

1. Under Section 1763, L. O. L., city detectives *held* within their rights and duties when they arrested without a warrant in a saloon a person suspected of robbery who had in his possession the stolen watch. (Askay v. Maloney, 566.)

ARCHITECT.

Acceptance or Rejection by Architect.

See Contracts, 3.

ASSESSMENT.

See Appeal and Error, 5.
See Municipal Corporations, 1, 2, 4.
See Quieting Title, 2, 3.

ASSIGNMENT OF ERROR.

See Appeal and Error, 20.

ATTORNEY AND CLIENT.

Attorney and Client—Notice to Attorney—Imputation to Principal.

1. Knowledge of an attorney, who was only acting for plaintiff in passing upon the sufficiency of title to several properties, that a

purchaser of land from plaintiff through defendant, a broker, had made a certain offer for the land, and that some of the properties received by plaintiff in part payment for her land actually belonged to the defendant, does not charge the plaintiff with constructive knowledge, where such attorney in every other detail was attorney for the purchaser. (Puffer v. Badley, 360.)

Attorney and Client—Special Trust—Fair Dealing.

2. The law requires that the conduct of an attorney, when dealing with his client, shall be characterized by fairness, honesty and good faith. (Kirchoff v. Bernstein, 378.)

Attorney and Client—Dealings—Burden of Proof.

3. When a client challenges the fairness of a contract made with his attorney, the attorney has the burden of showing, not only that he used no undue influence, but also that he gave to his client all the information and advice which it would have been his duty to give, if he himself had not been interested, and that the transaction was as beneficial to the client as if the latter had dealt with a stranger. (Kirchoff v. Bernstein, 378.)

Attorney and Client—Contracts for Compensation.

4. A client is ordinarily not entitled to relief from an agreement concerning compensation to be paid his attorney, unless he has suffered injury through an abuse of confidence on the part of the attorney. (Kirchoff v. Bernstein, 378.)

Attorney and Client—Accounting—Evidence.

5. In an action for an accounting, by the administrator of a deceased beneficiary under another's will against attorneys who represented such beneficiary in procuring his share under the will, evidence *held* to show that defendants, in securing a compromise of a *bona fide* contest of the will, acted in good faith and in accordance with instructions from the beneficiary. (Kirchoff v. Bernstein, 378.)

Attorney and Client—Accounting—Evidence.

6. In an action for an accounting, by an administrator of the estate of a beneficiary under another's will against attorneys who had represented such beneficiary in securing his share under the will, evidence *held* to show that the beneficiary was not deceived about defendants acting as attorneys for the executors of the will, as well as for such beneficiary. (Kirchoff v. Bernstein, 378.)

Attorney and Client—Value of Services—Services to Beneficiary of Estate.

7. Where attorneys for a foreign beneficiary kept him informed of the proceedings in the estate, and appeared in and settled a *bona fide* contest of the will, and forwarded him his share, amounting to over $50,000, in an action by the beneficiary's administrator against such attorneys for an accounting, the contention that valuable services were not performed by defendants for the beneficiary individually, although they were also attorneys for the estate's executors, cannot be sustained, and for such services a fee of $3,500, which was approved by the beneficiary, was reasonable. (Kirchoff v. Bernstein, 378.)

Reasonable Amount of Attorney's Fee.

See Executors and Administrators, 1.

AUTHORITY.

See Brokers, 1.
See Municipal Corporations, 16.
See Principal and Agent, 2.

BANKS AND BANKING.

Banks and Banking—Deposit to Cover Liens—Part of Price.

1. Where a sister and brother, the former holding realty under parol trust for the latter, conveyed to a buyer, it must be assumed that money held by a bank as a deposit to cover paving liens primarily belonged either to the brother or sister; it having been a part of the purchase price of the property. (De Vol v. Citizens Bank, 606.)

Banks and Banking—Action to Recover Escrow Deposit—Fact and Purpose of Deposit—Questions for Jury.

2. In action by vendor of realty to recover from bank a deposit made with it of part of purchase price in escrow to cover paving liens, whether the money was deposited with the bank by plaintiff, and the purpose for which it was deposited, *held* for the jury under the evidence. (De Vol v. Citizens Bank, 606.)

Banks and Banking—Escrow Deposit—Question for Jury.

3. In brother's action against bank to recover escrow deposit of part of price of realty conveyed by him and his sister, deposit having been made to secure paving liens, whether property sold and money deposited in bank were property and money of sister, and not of brother, *held* for jury under evidence, a question submissible by proper instruction. (De Vol v. Citizens Bank, 606.)

BENEFICIARY.

Rights of Beneficiary on Sale of Property.

See Trusts, 3.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.

Bills and Notes—Presentment of Check—Reasonable Time—Question for Court.

1. Where the facts are admitted or conclusively established, question whether check was presented within a reasonable time is one of law to be decided by the court. (Colwell v. Colwell, 103.)

Bills and Notes—Checks—Presentment—Reasonable Time.

2. Where a check was delivered and accepted in the city where the drawee bank was situated, reasonable time for presentment expired at the close of the next business day. (Colwell v. Colwell, 103.)

Bills and Notes—Rights of Payee—Necessity for Presentment.

3. Before an action can be maintained against a drawer upon a check, demand for its payment must be made from the drawee bank. (Colwell v. Colwell, 103.)

BOUNDARIES.

Boundaries—Mutual Agreement.

1. Where boundary lines are settled by mutual agreement or acquiescence for more than thirty years and marked by fences or other monuments, they become the true boundary lines. (Ogilvie v. Stackland, 352.)

Boundaries—Establishment—Survey.

2. When a boundary line has been accepted as marked and has been occupied by the respective owners for more than thirty years, such line cannot be considered as doubtful, uncertain, or disputed, so as to authorize proceedings by the county surveyor to establish a different division line under Section 2991, L. O. L. (Ogilvie v. Stackland, 352.)

BREACH OF CONTRACT.

See Municipal Corporations, 14–26.

BREACH OF WARRANTY.

As to Shortage in Acreage.

See Covenants, 2.

BROKERS.

Brokers—Authority—Acceptance of Deed.

1. Broker, negotiating real estate exchange transaction, was not authorized to accept deed without due authorization by grantees. (Rogers v. Wills, 16.)

Brokers—Contracts for Compensation—Statute of Frauds—Sufficiency of Memorandum.

2. A contract for the exchange of land drawn up by a real estate broker, signed by the broker's principal and the other party to the exchange, providing for a commission to be figured in regular manner and for the payment of the customary sum, but not stating to whom payable, not being a contract made for the benefit of the broker, and the broker having no privity or interest therein, was not a memorandum sufficient to satisfy the statute of frauds (Section 808, L. O. L.). (Rugh v. Soleim, 329.)

Brokers—Severable Contracts—Contract to Sell Realty and Personalty.

3. A contract whereby a broker was to sell or trade real and personal property providing for a lump sum without reference to the separate value of any particular item *held* not severable as to the realty. (Rugh v. Soleim, 329.)

Brokers — Action for Compensation — Unwritten Contracts Within Statute.

4. A contract whereby a broker is to sell real and personal property, including services within the statute of frauds, is void when not in writing as required by Section 808, L. O. L., notwithstanding part of the property is personal; action thereon being on the contract, and not for the *quantum meruit*. (Rugh v. Soleim, 329.)

Brokers—Compensation—Agreement—Statute of Frauds.

5. Section 808, L. O. L., as amended by Laws of 1917, page 786, declaring an agreement employing a broker to buy or sell real estate for compensation to be invalid unless in writing and subscribed by the party to be charged or his agent, describing the land and stating the commission to be paid, is satisfied by a written agreement so executed after the performance of the services. (Puffer v. Badley, 360.)

Brokers—Employment—Contract Evidence of Agency—Admissibility.

6. A written agreement, to pay a broker a stated compensation for selling real estate, satisfying the statute of frauds and purporting on its face to have been made after the sale, was properly admitted in evidence to show the relationship of principal and agent in a suit for money had and received by such broker. (Puffer v. Badley, 360.)

Brokers—Employment—Evidence of Agency—Sufficiency.

7. In an action to recover money received by defendant as plaintiff's agent in selling real estate, based upon defendant's alleged failure to disclose a true offer made by the purchaser for the land sold, evidence *held* sufficient to sustain finding that defendant was plaintiff's agent. (Puffer v. Badley, 360.)

Brokers — Action to Recover Money Received — Evidence — Value of Considerations Received from Sale.

8. Evidence as to the market value of lots conveyed to plaintiff by defendant as part of the purchase price for land sold by plaintiff to another through defendant as agent is admissible in action to recover the sum received by defendant in payment for such lots as part of an original cash offer for plaintiff's land, not disclosed by defendant to plaintiff, to show that plaintiff did not act capriciously in repudiating the transaction. (Puffer v. Badley, 360.)

Brokers—Accounting by Broker—Tender—Sufficiency.

9. The fact that, when a principal tendered her broker a deed to lots conveyed to her by him, and demanded payment of money retained by such broker from the proceeds of land sold by him for her, she made no mention of furniture included with a lot conveyed to her does not invalidate the rescission, where the broker refused to rescind. (Puffer v. Badley, 360.)

BULK SALES ACT.

See Fraudulent Conveyances, 1–3.

BURDEN OF PROOF.

See Attorney and Client, 3.
See Municipal Corporations, 11, 23.
See Partnership, 1.
See Quieting Title, 3.
See Wills, 3, 12, 13.

Shifting of Burden.

See Trial, 15, 16.

CERTIORARI.

Certiorari—Writ of Review—Issues Presented.

1. Only issues of law may be decided on a writ of review. (Cooper v. Bogue, 122.)

CHARTERS OF CITIES.

Cited and Construed in this Volume.

PORTLAND.

See Askay v. Maloney, 566.
See Duniway v. Cellars-Murton Co., 113.

CHECKS.

See Bills and Notes, 1–3.
See Limitation of Actions, 3.

CIRCUMSTANTIAL EVIDENCE.

See Wills, 7.

CITIES.

See Municipal Corporations.

CITY CHARTERS.

See Charters of Cities.

CLAIMS.

Necessity for Presentation of Claims.

See Counties, 1, 2.

COLLUSION.

See Contracts, 4.

COMPENSATION.

See Attorney and Client, 4.
See Brokers, 2, 4, 5.

COMPROMISE AND SETTLEMENT.

See Electricity, 1.
See Principal and Agent, 2.

CONCLUSION OF LAW.

See Pleading, 7.

CONCLUSIVENESS.

See Appeal and Error, 11.

CONCURRENT REMEDIES.

See Appeal and Error, 6, 7.

CONDITION PRECEDENT.

See Counties, 1.

CONFESSION.

See Appeal and Error, 2.

CONFIDENTIAL RELATIONS.

See Wills, 8.

CONFIRMATION OF SALE.

Setting Aside Confirmation of Sale.

See Execution, 1, 2.

CONSIDERATION.

See Brokers, 8.
See Landlord and Tenant, 5.

CONSPIRACY.

See Criminal Law, 8.

CONSTITUTIONAL LAW.

Constitutional Law—Judicial Legislation—Justice of Law.

1. The courts must accept a statute as they find it, though such an acceptance leads to a harsh result. (Bridges v. Multnomah County, 214.)

See Statutes, 3.

CONSTITUTION OF OREGON.

Cited and Construed in this Volume.

See Table in Front of this Volume.

CONSTRUCTION.

See Contracts, 5.
See Highways, 1.
See Replevin, 1.
See Statutes, 3.

CONTESTS.

See Wills, 17, 20.

CONTRACTOR.

See Highways, 1, 2.

CONTRACTS.

Contracts—Fraud—Actions for Damages—Affirmance.

1. Where a contractor was prevailed upon through misrepresentation to enter into a contract to render services and furnish material, there was no valid contract until it was ratified with a knowledge of the fraud, and even then affirmance did not effect waiver of claim for damages caused by fraud. (Multnomah County v. Standard Am. Dredging Co., 261.)

Contracts—Construction Contract—Waiver—Acceptance of Work.

2. Acceptance of work done under a construction contract does not constitute a waiver of latent defects of which the owner was ignorant at the time or which may appear thereafter. (Seaside, City of, v. Randles, 650.)

Contracts—Building Contracts—Acceptance or Rejection by Architect.

3. A contract which provides for work of construction to be performed in the best manner, and the materials of the best quality, subject to acceptance or rejection of an architect or engineer, all to be done in strict accordance with the plans and specifications, does not make acceptance by architect or engineer final and conclusive, and will not bind the owner or relieve the contractor from the agreement to perform according to plans and specifications. (Seaside, City of, v. Randles, 650.)

Contracts—Building Contracts—Approval by Supervising Engineer—Collusion.

4. An owner is not bound as against his contractor by the acts of a supervising engineer or inspector in approving work done by the contractor where such approval is the result of either bad faith, collusion, or gross negligence. (Seaside, City of, v. Randles, 650.)

Contracts—Construction—Province of Court.

5. It is the duty of the court to construe a written contract. (Seaside, City of, v. Randles, 650.)

See Attorney and Client, 4.
See Specific Performance, 1.

Action for Breach of Contract.

See Trial, 1, 2.

Contract or Tort.

See Action, 1.

Contract to Sell Realty and Personalty.

See Brokers, 2–9.

Contract as Modified by Custom.

See Customs and Usages, 1.

Contract to Convey in Consideration of Services.

See Wills, 27.

Election Between Tort and Contract.

See Pleading, 8.

Sewer Contracts.

See Evidence, 11, 12.
See Municipal Corporations, 14–26.
See Pleading, 12.

CONTRIBUTORY NEGLIGENCE.

See Landlord and Tenant, 6.
See Master and Servant, 1.

CORPORATIONS.

Corporations—De Facto Corporations—Rights.

1. As between private parties, the right of a *de facto* corporation to act as a corporation cannot be questioned. (Grant Chrome Co. v. Marks, 443.)

Corporations—De Facto Corporations.

2. Where there was an attempt in good faith to organize a corporation and the corporation proceeded to exercise corporate functions and elected corporate officers and expended large sums of money in operating and developing a mine, as a corporation, it was a *de facto* corporation, although the articles of incorporation were not filed in the office of the county clerk as required by law. (Grant Chrome Co. v. Marks, 443.)

COSTS.

See Appeal and Error, 20.

COUNTIES.

Counties—Suit Against County—Condition Precedent—Presentation of Claim.

1. In view of Sections 3048–3050, 3052, L. O. L., providing that auditor shall be the accounting officer for the county, "that all claims against the county" "shall be presented to him," and that "he shall examine and audit" every claim, a claimant must allege and prove that he has presented claim arising out of contract to the auditor. (Bridges v. Multnomah County, 214.)

Counties—Presentation of Claim to Auditor—Pleading.

2. Plaintiffs, by expressly alleging that they presented their claim based on contract to the board of county commissioners, impliedly say that they did not present it to the county auditor, and their complaint is insufficient to support judgment, though containing allegation that payment of claim was demanded and refused by the county. (Bridges v. Multnomah County, 214.)

COURTS.

Courts—State Courts—Jurisdiction.

1. A state court has jurisdiction of an action for false imprisonment against a sanitarium to which plaintiff was alleged to have been illegally committed as insane by a United States territorial court or officer. (Zuckerman v. Sanitarium Co., 90.)

Courts—District Court—Appeal—Trial of Cause Anew.

2. Section 556, L. O. L., providing that on appeal from judgment of County Court the action shall be tried anew on substantially the issues tried in the lower court, includes issues of fact as on denial of pleading and issues of law as on demurrer to a pleading. (Cooper v. Bogue, 122.)

Courts—Rules of Decision—Stare Decisis.

3. Where law laid down by decision of the Supreme Court construing public contractor's bond executed under Section 6266, L. O. L., has been in force and effect for more than a year, during which time many similar bonds have been written, the case has become *stare decisis*. (Multnomah Co. v. United States Fidelity & G. Co., 146.)

Courts—Stare Decisis.

4. When one of the clauses of the Constitution has been construed by the Supreme Court, that construction should not be set aside

except for the most cogent reasons. (Olcott, Gov., v. Hoff, St. Treas., 462.)

Courts—Records—Correction—In Term.

5. During the term the record of the court's proceedings is in the bosom of the court and subject to correction. (Churchill v. Meade, 626.)

Vacating Order at Subsequent Term.

See Divorce, 3–5.
See Motions, 1.

Time to Vacate Void Judgments.

See Judgments, 3.

COVENANTS.

Covenants—Vendor and Purchaser—Warranty—Quantity.

1. Where sale is for a gross sum and not by the acre, and the acreage stated in the conveyance is qualified by the words "more or less," there is no warranty of the exact quantity. (Ogilvie v. Stackland, 352.)

Covenants—Warranty—Breach—Shortage in Acreage.

2. A shortage of one sixth of an acre in 100-acre farm sold would not be a breach of warranty as to quantity. (Ogilvie v. Stackland, 352.)

Covenant of Warranty.

See Evidence, 10.

CRIMINAL LAW.

Criminal Law—Review—Instructions—Rape—Verdict—Evidence.

1. In a prosecution under Section 2077, L. O. L., for fornication, where prosecutrix was over sixteen years old, so that the crime could not be rape, under Section 1912, and the jury was instructed on forcible rape, and that if defendant's acts constituted rape he must be acquitted of the fornication charged, it must be assumed the jury by its verdict of guilty found defendant's acts did not constitute rape. (State v. Mallory, 133.)

Criminal Law—Witnesses—Accomplices—Intent.

2. The provision of Section 1540, L. O. L., that a conviction cannot be had upon the uncorroborated testimony of an accomplice connecting defendant with the crime, does not apply to a conviction of fornication under Section 2077, under which the male person only can be guilty, and where the evidence shows that prosecutrix was not an accomplice, because she did not knowingly, voluntarily, and with a common intent unite in the commission of the crime. (State v. Mallory, 133.)

Criminal Law—Dismissal of Indictment—Failure to Try Case at Following Term.

3. Assuming that district attorney, in an interview with defendant's attorney, made oral agreement that cases should be continued from October to April term, and should then be dismissed, and that

district attorney violated the agreement, it would not be a sufficient ground for dismissal of indictments under Section 1701, L. O. L., as to indictment being dismissed, where defendant is not tried at next term of court, in view of Article I, Section 10, of the Constitution, providing that justice shall be administered openly and without purchase. (State v. Moss, 449).

Criminal Law—Dismissal for Delay—Review.

4. Since the trial court had personal knowledge of all the proceedings, his ruling, denying motion to dismiss indictment for failure to try case at next term of court, is entitled to some weight on appeal. (State v. Moss, 449.)

Criminal Law—Dismissal of Indictment—Failure to Try Case at Following Term.

5. Where cases were continued from the October to April term with express consent and approval of defendant, and defendant, though present, did not demand a trial at the April term, and at the next October term withdrew motions then made to dismiss because the case was not tried at the April term, defendant's motions to dismiss, thereafter made, do not come within Section 1701, L. O. L., or Article I, Section 10, of the Constitution. (State v. Moss, 449.)

Criminal Law—Dismissal of Case—Waiver of Grounds.

6. In legal effect defendant's withdrawal of motion to dismiss, with the statement in open court that he was ready for trial, and his application and consent to have the cases set for trial, constituted waiver of his right thereafter to insist upon motion to dismiss the indictments. (State v. Moss, 449.)

Criminal Law—Appeal—Technical Error.

7. Where the evidence establishes plaintiff's guilt beyond any reasonable controversy, judgment of conviction will be affirmed under Article VII, Section 3, of the Constitution, notwithstanding technical errors. (State v. Newlin, 589.)

Criminal Law—Evidence—Entrapment.

8. In prosecution for the unlawful sale of liquor, evidence that a witness who had testified to buying liquor from defendant had upon another occasion in another county liquor in his possession was inadmissible in support of theory that the liquor which defendant was alleged to have sold had been planted in his store by witness, where there was no evidence of a conspiracy to entrap defendant and no evidence to support such theory. (State v. Newlin, 589.)

Criminal Law—Submission of Theories.

9. A party is entitled to have his theory of the case presented to the jury if there is evidence to support such theory. (State v. Newlin, 589.)

Criminal Law—Instructions—Entrapment—Evidence.

10. In prosecution of druggist for unlawful sale of liquors, requested instruction that defendant could not be convicted if the liquor in evidence had been planted in the store by the witness who testified to having purchased it, and the druggist had not in fact sold liquor, was properly refused, where there was no evidence that the

witnesses who had testified to purchasing liquor had brought the liquor to the store. (State v. Newlin, 589.)

Criminal Law—Instructions on Evidence.

11. Court is not required to instruct specially upon every item of testimony introduced. (State v. Newlin, 589.)

Criminal Law—Instructions—Singling Out Evidence.

12. It is bad practice to single out a particular item of testimony and give it undue prominence in an instruction. (State v. Newlin, 589.)

Criminal Law—Second Offense—Indictment.

13. Defendant cannot be adjudged guilty of a second offense and sentenced accordingly, in the absence of an allegation in the indictment charging the prior conviction. (State v. Newlin, 589.)

Criminal Law—Intoxicating Liquors—Former Conviction—Separate Offenses—Question for Jury.

14. Where druggist discussed unlawful sale of intoxicating liquors to two customers, to whom, later in the day, at different times, he sold liquor, each sale was complete in itself and a separate offense, and the submission to the jury of the question of former conviction *held* not justified. (State v. Newlin, 597.)

Criminal Law—Third Offense—Indictment.

15. Defendant cannot be convicted of third offense and sentenced accordingly, in the absence of an allegation in the indictment charging the prior conviction. (State v. Newlin, 597.)

Criminal Law—Trial—Objections to Evidence.

16. Objection "irrelevant, immaterial, and not in rebuttal" goes to the introduction of the evidence on rebuttal, and does not, as is necessary for review, raise the question of it being evidence of another crime. (State v. Merlo, 678.)

Criminal Law—Trial—Objections to Evidence.

17. Objection "irrelevant, immaterial, and incompetent and not proper rebuttal, and witness has not shown sufficient qualifications," can only be considered on the ground of evidence not being proper rebuttal. (State v. Merlo, 678.)

Criminal Law—Order of Introduction of Evidence—Discretion of Court.

18. Order of introduction of evidence is in the sound discretion of the trial court. (State v. Merlo, 678.)

Criminal Law—Harmless Error—Departure from Code Procedure.

19. Under Section 1538, L. O. L., departure from a mode of proceeding, even if prescribed by the Code, is not ground for reversal unless it appear that substantial rights of defendant have been prejudiced. (State v. Merlo, 678.)

Criminal Law—Recalling Witness—Discretion.

20. Leave to recall a witness being by provision of Section 862, L. O. L., in the sound discretion of the trial court, it is only for abuse thereof that its ruling can be disturbed. (State v. Merlo, 678.)

Criminal Law—Credibility of Witnesses—Instructions—"Falsely."

21. The court need not add the word "willfully" to the instruction prescribed by Section 868, subdivision 3, L. O. L., "that a witness false in one part of his testimony is to be distrusted in others," "falsely" importing this, and not being of the same import as "mistakenly." (State v. Merlo, 678.)

Criminal Law—Appeal—Harmless Error—Constitution.

22. Article VII, Section 3, of the Constitution as amended in 1910, at least accentuates the law as it stood in regard to prejudicial error, in favor of an affirmance unless actual prejudicial error appears. (State v. Merlo, 678.)

Criminal Law—Leading Questions—Reversible Error.

23. In prosecution for murder, that the state, after one of its witnesses had stated that he did not know whether defendant wife or the victim, her husband, started quarrels when "they used to quarrel," elicited testimony from the witness that he had made a contradictory statement before the grand jury *held* not to require reversal, in view of Section 1626 L. O. L. as to errors not affecting substantial rights, and Section 858 as to leading questions; the witness being reluctant. (State v. Merlo, 678.)

Criminal Law—Limited Use of Testimony.

24. Where a party is permitted to refresh the recollection of his own witnesses by directing attention to prior inconsistent statement, the court should inform the jurors that prior statement cannot be considered as substantive testimony. (State v. Merlo, 678.)

Criminal Law—Improper Cross-examination—Harmless Error.

25. Assuming that cross-examination of defendant's witness with reference to whether defendant had the reputation of getting "drunk" was objectionable, answers of witness, "I don't think so," were without prejudice to defendant. (State v. Merlo, 678.)

Criminal Law—Erroneous Admission of Testimony—Harmless Error.

26. In prosecution for murder, *held* that defendant was not prejudiced by reason of introduction in evidence of testimony as to her intoxication on the day of the homicide in rebuttal instead of in chief. (State v. Merlo, 678.)

Criminal Law—Evidence of Independent Crime—Reversible Error.

27. In prosecution of defendant wife for the killing of her husband, permitting a witness to state what he had heard about the time defendant got a revolver and was going to kill "his uncle" was reversible error. (State v. Merlo, 678.)

CROSS-EXAMINATION.

See Witnesses, 3.

Improper Examination.

See Criminal Law, 25.

CRUEL AND INHUMAN TREATMENT.

See Divorce, 1, 2.

CUSTOMS AND USAGES.

Customs and Usages—Contracts as Modified by Custom—Requisites.

1. To be binding, a custom must be reasonable, general, known to the parties, or of such general notoriety that their knowledge of it must be presumed. (Rugh v. Soleim, 329.)

DAMAGES.

Damages—Fire—Defense—Payment of Loss by Insurance Company.

1. In action for negligent destruction of property by fire, defendant would not have the right to benefit of the insurance, and cannot rely, either in whole or in part, on defense that owner has been paid insurance by the company. (Northwest Door Co. v. Lewis Inv. Co., 186.)

See Contracts, 1.

Waiver of Right to Damages.

See Fraud, 2.

DECLARATIONS.

Declarations of Alienated Spouse.

See Husband and Wife, 2–4.

DEDICATION.

Dedication—Highway—Evidence.

1. Evidence *held* to show that there had been a dedication for the use of the public as a county road of all land between the lines of two old rail fences erected by plaintiffs' predecessor, so that plaintiffs were not entitled to any of the land between such lines. (Richardson v. Polk County, 24.)

Dedication—Public Streets—Implied Dedication.

2. Where private property was used for more than ten years continuously by the public as a street with the knowledge of the owners and without protest from them, the city had a right to the use of the land as a public street by implied dedication. (Kennedy v. Portland, 300.)

DEEDS.

Deeds—Delivery to Unauthorized Agent.

1. Delivery of deed to real estate agent who negotiated real estate exchange transaction, who was without authority from grantees to accept deed, did not constitute a delivery to grantees. (Rogers v. Wills, 16.)

Deeds—Delivery—Custody of Agent.

2. Delivery of deed to grantees was a good and complete delivery passing title, which could not revest in grantor by reason of the fact that grantee immediately surrendered custody of conveyance to agent negotiating transaction as security for his commission. (Rogers v. Wills, 161.)

Deeds—Delivery—Evidence.

3. In an action to annul a deed, evidence *held* sufficient to sustain a finding that the deed had never been delivered. (Hirtzel v. Drake, 71.)

See Easements, 4.

Delivery to Unauthorized Agent.

See Brokers, 1.
See Principal and Agent, 1.

DE FACTO CORPORATIONS.

See Corporations, 1, 2.

DEFAULT.

Opening Default.

See Appeal and Error, 28.

DEFENSES.

Defenses not Pleaded.

See Appeal and Error, 24.

Which Might have been Urged.

See Judgment, 2.

DELIVERY.

See Brokers, 1.
See Deeds, 1, 2, 3.
See Principal and Agent, 1.

DELUSION.

See Wills, 14, 15, 22, 23.

DETECTIVES.

See Municipal Corporations, 7–13.

DISCRETION OF COURT.

See Appeal and Error, 14.
See Criminal Law, 18, 20.
See Partition, 5.

DISMISSAL AND NONSUIT.

See Appeal and Error, 8, 23.
See Trial, 13.

DIVORCE.

Divorce—Cruel and Inhuman Treatment—Evidence—Sufficiency.

1. In divorce suit by the husband, evidence of defendant's jealousy, and cruel and inhuman treatment, consisting in part of false accusations of plaintiff's infidelity, *held* sufficient to justify a decree for plaintiff. (Railsback v. Railsback, 623.)

Divorce—Settlement of Property Rights—Repayment of Money Used by Plaintiff Husband.

2. Where a divorce is granted to the plaintiff husband, and it appears from the testimony that shortly after their marriage the defendant wife received $3,000, at least a part of which was spent in assisting the plaintiff in business, although defendant's acts probably prevented plaintiff from earning as much money as he otherwise would, he should be required to make such payment to her as would be an equitable squaring of the account. (Railsback v. Railsback, 623.)

Divorce—Vacating Judgment—Authority of Court—Time of Vacation.

3. Where wife sued for divorce on published summons, and affidavit of mailing erroneously and inadvertently showed mailing only 10 days before the day for answer, when in fact it was 40 days before such day, default decree against the husband was void and could be vacated, although several terms had elapsed since its rendition. (Wade v. Wade, 642.)

Divorce—Decree—Amendment of Record.

4. Where wife sued for divorce on published summons, and affidavit of mailing erroneously and inadvertently showed mailing only 10 days before the day for answer, when in fact it was 40 days before such day, default decree against the husband was validated by a subsequent order *nunc pro tunc* for the amendment of the affidavit to show the true date of service. (Wade v. Wade, 642.)

Divorce—Service by Publication—Amendment Nunc Pro Tunc of Proof of Service.

5. Where it appeared, after default divorce decree had been rendered on published summons, that affidavit of mailing erroneously showed mailing only 10 days before answer, whereas, in fact, mailing had taken place 40 days prior thereto, court had jurisdiction to amend proof of service *nunc pro tunc*. (Wade v. Wade, 642.)

EASEMENT.

Easements—Necessity—Presumption—Implied Grant.

1. Where tract conveyed is surrounded, at least in part, by other lands of grantor, there is a presumption of fact that a way of necessity is impliedly granted across grantor's property when no other adequate means of access is available. (Tucker v. Nuding, 319.)

Easements—Necessity—Access by Water.

2. Ordinarily, no right of way by necessity pertains to land which borders, and to which there is adequate access, upon the sea. (Tucker v. Nuding, 319.)

Easements—Necessity—Duration.

3. A right of way by necessity exists only while person claiming it has no other adequate means of access. (Tucker v. Nuding, 319.)

Easements—Necessity—Conveyance.

4. Where owner of estate imposes on one part an obvious and reasonably necessary servitude in favor of another part, the servitude

passes with a conveyance of dominant portion by implied grant. (Tucker v. Nuding, 319.)

Easements—Way of Necessity—Public Lands.

5. A grantee is not precluded from claiming right of way by necessity over remaining lands of his grantor by fact that granted land was partly surrounded by public domain over which grantee had a license to pass, revocable by entry under federal land laws. (Tucker v. Nuding, 319.)

Easements—Way of Necessity—Description.

6. A right of way by necessity *held* described in complaint with sufficient definiteness by reference to a roadway. (Tucker v. Nuding, 319.)

Easements—Necessity—Adverse Possession.

7. A right of way by necessity can be destroyed only by adverse possession sufficient to create a prescriptive right, and is unaffected where possession was only for one and one half years. (Tucker v. Nuding, 319.)

ELECTION OF REMEDIES.

See Appeal and Error, 7.

ELECTRICITY.

Electricity—Overcharge—Treble Damages—"Person Injured" — Compromise.

1. Within Public Utilities Act, Sections 67 and 75, authorizing recovery of treble damages by "person injured" for overcharge by public utility, customer of light and power company was not "injured" where customer contracted with an agent for discovering overcharges, and agent made a settlement, as authorized to do, for the amount of overcharge discovered. (Cash v. Portland Ry. L. & P. Co., 81.)

ENTRAPMENT.

See Criminal Law, 8, 10.

EQUITABLE DEFENSES IN ACTION AT LAW.

See Action, 2.

EQUITY.

Equity—Amendment to Conform to Proof.

1. Where, in an action to have a trust declared in land deeded by a parent of the parties to defendant, the trial revealed evidence showing that the deed had never been delivered to defendant, the court properly allowed plaintiffs to amend their complaint to conform with the proof; defendant being granted time to meet the amended pleadings with answers and additional evidence. (Hirtzel v. Drake, 71.)

Equity—Maxims.

2. Equity ministers to the diligent and not to the negligent. (Churchill v. Meade, 626.)

ESCROW.

See Evidence, 10.
See Jury, 1.

Action to Recover Escrow Deposit.

See Banks and Banking, 2, 3.

ESTOPPEL.

Estoppel—Testimony of Witness of Adverse Party.

1. A party in a case cannot be estopped or concluded by the mere testimony of a witness offered by the adverse party. (De Vol v. Citizens Bank, 606.)

EVIDENCE.

Evidence—Judicial Notice—Alaska.

1. Judicial notice will be taken of fact that Alaska is a part of United States and that, under Act Cong. Feb. 6, 1909, Secretary of the Interior was authorized to make a contract with a private sanitarium company for the care of persons adjudged insane in such territory. (Zuckerman v. Sanitarium Co., 90.)

Evidence—Judicial Notice—Location of Buildings.

2. The Supreme Court cannot take judicial notice of the former existence or respective locations of a certain schoolhouse and church or old meeting-house, or of a certain tavern. (Burch v. City of Amity, 153.)

Evidence—Photographs—Admissibility.

3. There being evidence tending to show that the condition of the premises photographed were substantially the same as on the day of the fire, in question, there was no error in admitting the photographs. (Northwest Door Co. v. Lewis Inv. Co., 186.)

Evidence—Competency of Expert—Market Value.

4. Preliminary testimony of a witness, tending to show that she had considerable knowledge of the market prices of the machinery, *held* to render her competent to testify as an expert as to the value of machinery destroyed by fire. (Northwest Door Co. v. Lewis Inv. Co., 186.)

Evidence—Testamentary Capacity.

5. Under Section 727, L. O. L., witnesses who were intimate acquaintances of testator may express their opinion as to his sanity and give reasons therefor, but they cannot decide whether or not he had capacity to make the will, as that would invade the province of the court. (Sturtevant v. Sturtevant, 269.)

Evidence—Hearsay—Statement in Defendant's Absence.

6. In action for alienation of affections of plaintiff's wife by defendant, her father, testimony of a witness regarding wife's statement, made in defendant's absence that defendant had given her money with which to procure an abortion was hearsay and inadmissible. (Schneider v. Tapfer, 520.)

Evidence—Action for Alienation of Affections—Admissibility of Hearsay.

7. In action for alienation of affections of plaintiff's wife by defendant, her father, testimony of plaintiff that his wife had told him before the marriage that her father and mother wanted her to quit plaintiff altogether was hearsay and incompetent, being made four years before wife finally left plaintiff. (Schneider v. Tapfer, 520.)

Evidence—Judicial Notice—Municipal Charter.

8. Under Laws of 1917, page 514, Supreme Court must take judicial notice that on December 25, 1914, the City of Portland was working under the charter which went into effect July 1, 1913, as revised by the council of the city, August 19, 1914; the charter having been filed as required. (Askay v. Maloney, 566.)

Evidence—Implied Admission—Failure to Answer Letter.

9. Where vendor deposits in bank in escrow part of purchase price as security for paving liens, correspondence between him and bank in relation to transaction is evidence thereof, and where he wrote bank stating transaction in a certain way, and bank did not disclaim, or otherwise answer, vendor's letter, with fact it was not answered, is evidence in nature of an implied admission as to truth of facts stated. (De Vol v. Citizens Bank, 606.)

Evidence—Parol Evidence Affecting Writing—Covenant of Warranty—Escrow Deposit.

10. In action by vendor against bank to recover part of price deposited in escrow as security for paving liens, evidence of contract alleged by plaintiff *held* not inadmissible as varying terms of covenant of warranty in his deed, but related to an independent transaction. (De Vol v. Citizens Bank, 606.)

Evidence—Sample Sewer-pipe—Rebuttal of Expert Evidence.

11. In city's action against sewer contractor for failure to construct sewer according to specifications requiring mortar to be made of two parts sand to one part of cement, where there was expert evidence for contractor that such mortar would disintegrate in a very short time, the sample sewer-pipe, laid six years prior thereto with use of same proportion of sand and cement, was admissible to show that mortar used in the joints did not disintegrate, such evidence being competent to rebut expert testimony. (Seaside, City of, v. Randles, 650.)

Evidence—Action on Sewer Contract—Admissibility of Evidence—Intentions of Witness.

12. In city's action against sewer contractor for failure to construct sewer according to contract, involving issue of whether city had accepted the sewer, it was proper for city engineer, after having testified that in accepting he relied upon contractor's statement, to testify that he would not have accepted sewer if he had known the true facts. (Seaside, City of, v. Randles, 650.)

See Appeal and Error, 3, 9, 14, 21, 22, 23.
See Attorney and Client, 5, 6.
See Brokers, 6–8.
See Criminal Law, 1, 10–12, 16–18, 24, 26, 27.

See Dedication, 1.
See Deeds, 3.
See Divorce, 1, 2.
See Estoppel, 1.
See Fornication, 2.
See Husband and Wife, 1, 5.
See Intoxicating Liquors, 1.
See Landlord and Tenant, 2, 4.
See Master and Servant, 1.
See Municipal Corporations, 6, 15, 25.
See Negligence, 3, 4.
See Trial, 5, 10, 11, 14, 15.
See Trusts, 1, 2.
See Wills, 4, 10, 11, 15, 17–20, 27.
See Witnesses, 2.

Erroneous Admission of Testimony.
See Criminal Law, 26.

Evidence of Independent Crime.
See Criminal Law, 27.

EXCEPTIONS, BILL OF.

See Appeal and Error, 20.

EXECUTION.

Execution—Setting Aside Confirmation of Sale.

1. Decree confirming execution sale will not be set aside after term at which it was entered except through an original suit to set it aside based upon some equitable ground for relief. (Churchill v. Meade, 626.)

Execution—Setting Aside Confirmation of Sale—Mistake.

2. In view of Section 756, L. O. L., equity will not set aside decree confirming execution sale merely because judgment creditor purchased property for a sum in excess of balance due on judgment, and in excess of value of property, as result of miscalculation as to balance due on judgment. (Churchill v. Meade, 626.)

EXECUTORS AND ADMINISTRATORS.

Executors and Administrators—Attorney's Fees—Amount.

1. An attorney's fee of $3,500, allowed by the County Court for services rendered to executors of an estate worth $98,886, *held* reasonable. (Kirchoff v. Bernstein, 378.)

EXPERT.

Competency of Expert Evidence.
See Evidence, 4.

Rebuttal of Expert Evidence.
See Evidence, 11.

FALSE IMPRISONMENT.

False Imprisonment—Confinement of One Adjudged Insane.

1. It appearing that trial and commitment of plaintiff as an insane person were before and by court having jurisdiction of subject matter and of person of plaintiff, she cannot recover damages for false imprisonment from a sanitarium to which she was legally committed. (Zuckerman v. Sanitarium Co., 90.)

FEES.

Attendance on Court Outside of County.

See Witnesses, 1.

FINDINGS.

See Appeal and Error, 4, 11.

FIRE INSURANCE.

See Damages, 1.
See Insurance, 3, 4.
See Parties, 1.

FIRES.

See Damages, 1.
See Negligence, 1–4.

FORNICATION.

Fornication—Corroboration of Injured Female.

1. Section 1542, L. O. L., specifically requiring that the evidence of the female abducted or seduced must be corroborated, applies to abduction and seduction only, and not to the crime of fornication, defined in Section 2077. (State v. Mallory, 133.)

Fornication—Previous Chaste Character of Female—Evidence.

2. In a prosecution under Section 2077, L. O. L., providing that any male person over eighteen years old, who shall in such a manner as not to constitute rape carnally know any female person of previous chaste and moral character over sixteen and under eighteen years of age and not his lawful wife, shall be deemed guilty of fornication, evidence *held* sufficient to show that the prosecutrix was of previous chaste character. (State v. Mallory, 133.)

FRAUD.

Fraud—Complaint—Injury to Plaintiff.

1. Complaint in action for fraud *held* demurrable as failing to show injury to plaintiff. (Schwedler v. First State Bank of Gresham, 33.)

Fraud—Waiver of Right to Damages.

2. Where a contractor entered into a contract by reason of misrepresentations as to the amount of the work, completion of the work after becoming aware of the misrepresentations was not a waiver of the contractor's right to damages by reason of the fraud. (Multnomah County v. Standard Am. Dredging Co., 261.)

See Contracts, 1.
See Limitation of Actions, 1.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT CONVEYANCES.

Fraudulent Conveyances—Bulk Sales Act—Pleading.

1. Since, unless the affidavit prescribed in Section 6069, L. O. L., as amended by Laws of 1913, page 538, is furnished, the statute makes a sale of goods in bulk conclusively fraudulent and void, it is sufficient, for the purpose of defeating such a transfer, to allege the facts bringing the transaction within the statute, without alleging actual fraudulent intent. (Fitzhugh v. Munnell, 47.)

Fraudulent Conveyances—Bulk Sales Act—Affidavit.

2. Section 6069, L. O. L., as amended by Laws of 1913, page 538, as to bulk sales, contemplates two classes of creditors, those whose claims are due, and those whose indebtedness is not yet due, but is to become due, and it is imperative that the sworn statement required by the law state the facts as to both classes of creditors, if both exist, and if there are none such, that the latter fact be stated. (Fitzhugh v. Munnell, 47.)

Fraudulent Conveyances—Bulk Sales Act—Innocent Purchaser.

3. Under Section 6069, L. O. L., as amended by Laws of 1913, page 538, as to bulk sales, a buyer is protected in his purchase where the seller has made a statement, under oath, fair upon its face, and the buyer has no knowledge of its correctness and nothing to put him on inquiry about it, but not where the insufficiency of the seller's affidavit is apparent on its face. (Fitzhugh v. Munnell, 47.)

GUARDIANSHIP.

When Persons Under Guardianship may Execute Will.

See Wills, 16.

HARMLESS ERROR.

See Appeal and Error, 21.
See Criminal Law, 19, 22, 25, 26.

HEARSAY.

See Evidence, 6, 7.

HIGHWAYS.

Highways—Improvement—Contractor's Bond—Construction.

1. Where highway contractor's bond is executed under Section 6266, L. O. L., as to public contractor's bond, the statute should be read in and become a part of the bond. (Multnomah Co. v. United States Fidelity & G. Co., 146.)

Highways—Improvement—Construction of Bond—"Labor."

2. Highway contractor's bond executed under Section 6266, L. O. L., and conditioned upon his making prompt payment to all "persons supplying him * * labor * * for any prosecution of the work," *held* to include payment to owner of horses for services of horses in prose-

cution of the work; such services constituting "labor." (Multnomah Co. v. United States Fidelity & G. Co., 146.)

See Dedication, 1.

HUSBAND AND WIFE.

Husband and Wife—Action for Alienation of Affections—Evidence Admissible.

1. In action for alienation of affections of plaintiff's wife by defendant, her father, testimony to the effect that defendant had approved of abortion by wife *held* irrelevant to issues involved in the case. (Schneider v. Tapfer, 520.)

Husband and Wife—Alienation—Declarations of Alienated Spouse—Admissibility.

2. Declarations of alienated spouse, made prior to alienation in the absence of defendant, are admissible when they tend to disclose affection and the relations between the spouses. (Schneider v. Tapfer, 520.)

Husband and Wife—Alienation—Declarations of Alienated Spouse—Admissibility.

3. Declarations of alienated spouse, made in defendant's absence, are admissible when made at or approximately before alienation, where they are of a character likely to disclose the mind and motive of the alienated one and the effect on his or her mind or motive which the supposed words or conduct of defendant has had. (Schneider v. Tapfer, 520.)

Husband and Wife—Alienation—Declarations of Alienated Spouse—Admissibility.

4. Where declarations of alienated spouse, made in defendant's absence, are not of a character which bear upon the mental state or motives of the alienated spouse, and where they are unaccompanied by any declarations upon her part which bear upon her mind or motive, they are wholly inadmissible. (Schneider v. Tapfer, 520.)

Husband and Wife—Action for Alienation of Affections—Evidence Admissible.

5. The judgment-rolls in actions brought by defendant, father of plaintiff's wife, against plaintiff and wife after the culmination of the acts of alienation complained of, were inadmissible, being offered for the apparent purpose of showing malice on the part of defendant and that he was engaged in a general scheme to bring about plaintiff's ruin. (Schneider v. Tapfer, 520.)

Husband and Wife—Alienation of Affections—Elements of Wrong.

6. In action for alienation of affections of plaintiff's wife by defendant, her father, plaintiff must prove: First, that defendant did actually alienate; and, second, that his action was malicious. (Schneider v. Tapfer, 520.)

HYPOTHETICAL ALLEGATIONS.

See Pleading, 10.

IMPEACHMENT.

See Witnesses, 2, 6, 8, 10.

Impeachment of Own Witness.

See Witnesses, 5, 7.

IMPLIED DEDICATION.

Private Property Used by Public as a Street.

See Dedication, 2.

IMPLIED GRANT.

Presumption as to Implied Grant.

See Easements, 1, 4.

IMPROVEMENT.

See Highways, 1, 2.
See Municipal Corporations, 4, 14, 15.

INCONSISTENT STATEMENTS.

See Witnesses, 4, 6–8.

INDICTMENT.

See Criminal Law, 3–6, 13, 15.

INITIATIVE AND REFERENDUM.

See Statutes, 2, 3.

INNOCENT PURCHASER.

See Fraudulent Conveyances, 3.

INNKEEPER.

Innkeepers—Distinction from "Lodging-house Keeper"—"Boarding-house Keeper."

1. At common law, an "innkeeper" catered to the traveling public, the transient travelers who in passing through the country stopped from day to day in the pursuit of their travels, while the "lodging-house or boarding-house keeper" took care of more permanent customers, who remained for longer periods, more or less permanently. (McIntosh v. Schops, 307.)

Innkeepers—Liability to Guests.

2. An innkeeper though held to a very high degree of care for goods of his guests, does not incur such strict liability except to one who sustains the relation of a "guest," and he may be an innkeeper to some persons, "guests" as such, and only a lodging-house keeper as to others. (McIntosh v. Schops, 307.)

Innkeepers—Liability for Goods of Lodger—Pleading and Proof of Negligence.

3. The duty of an innkeeper toward the goods of a relatively permanent lodger or boarder being that of ordinary care only, and

being the same duty owed by the ordinary bailee for hire and no more, there is no presumption of his negligence in case of theft or burglary. (McIntosh v. Schops, 307.)

Innkeepers—Status as "Lodger" Rather Than "Guest."

4. Where plaintiff's occupancy of a room in defendant's hotel was of a permanent nature at a fixed rental per week or month, and extended from January 16th to April 4th, and from April 18th to March 18th, *prima facie*, in the absence of evidence to the contrary, plaintiff was a "lodger," or boarder, of a lodging-house keeper, rather than a "guest" of an innkeeper in the strict sense. (McIntosh v. Schops, 307.)

INSTRUCTIONS.

See Appeal and Error, 13.
See Criminal Law, 1, 10–12, 21.
See Landlord and Tenant, 1.
See Municipal Corporations, 26.
See New Trial, 1.
See Principal and Agent, 3.
See Trial, 1–9, 12, 16.

Interference With Province of Jury.

See Trial, 16.

INSURANCE.

Insurance—Accident Insurance.

1. If a man deliberately assaults another with a lethal weapon in his hand, such as a pistol, whether it be loaded or not, it cannot be said that the injuries he receives in the resulting struggle are accidentally received within terms of insurance policy. (Meister v. General Accident Corp., 96.)

Insurance—Fire Insurance—Rights Against Third Party—Subrogation.

2. Where company pays loss upon property destroyed by fire through negligence of a third person, the company becomes subrogated to the rights of insured to the extent of money paid under the policy. (Northwest Door Co. v. Lewis Inv. Co., 186.)

Insurance—Fire Insurance—Payment of Loss.

3. Evidence *held* sufficient to take to the jury the question whether insurance company paid any losses, so that they were entitled to be subrogated to insured's rights against defendant, a third person, through whose negligence the property was destroyed by fire. (Northwest Door Co. v. Lewis Inv. Co., 186.)

INTENT.

See Criminal Law, 2.
See Evidence, 12.

INTESTACY.

See Wills, 1.

INTOXICATING LIQUORS.

Intoxicating Liquors—Sale—Sufficiency of Evidence.

1. In prosecution of druggist for the unlawful sale of liquors, evidence *held* to establish guilt beyond any reasonable doubt. (State v. Newlin, 589.)

Intoxicating Liquors—Criminal Prosecution—Separate Offenses.

2. Where seller of intoxicating liquors makes unlawful sale to customer who pays for the liquor and removes it from seller's place of business and thereafter returns and buys another package of liquor, the two sales constitute two separate offenses. (State v. Newlin, 597.)

See Criminal Law, 14.

JUDGMENT.

Judgment—Pleading to Support.

1. Complaint in suit against county on claim arising out of contract, where lacking in material and essential allegation that claim had been presented to county auditor as required by Sections 3048, 3049, 3052, L. O. L., will not support judgment for claimant. (Bridges v. Multnomah County, 214.)

Judgment—Res Adjudicata—Defenses Which Might have been Urged.

2. One who sued for the partition to real property under Sections 435, 436, 440, 441, L. O. L., his pleadings being silent as to rents, issues and profits, cannot complain, in a subsequent action by the defendant for rents, issues and profits, that the plaintiff should have set up such matter in his answer in the partition suit. (Jacobs v. Jacobs, 255.)

Judgment—Vacating Judgment—Authority of Court—Time of Vacation.

3. Superior Courts possess authority to vacate void judgments at any time. (Wade v. Wade, 642.)

JUDICIAL INTIMATION.

See Trial, 8.

JUDICIAL LEGISLATION.

See Constitutional Law, 1.

JUDICIAL NOTICE.

See Evidence, 1, 2, 8.

JURISDICTION.

See Courts, 1.

Original Proceedings in Supreme Court.

See Mandamus, 2.

JURY.

Jury—Action Against Bank—Escrow Deposit—Legal Nature.

1. An action by the vendor of land against a bank with which he had deposited part of the price of the land in escrow as security

for paving liens, being in nature of action for money had and received for his benefit, was not a suit in equity, but an action at law, properly tried before a jury. (De Vol v. Citizens Bank, 606.)

JUSTICES OF THE PEACE.

Justices of the Peace — Undertaking on Appeal — Limitation in Amount.

1. It is sufficient that an undertaking on appeal from a Justice Court follow the terms of the statute, and it should not be limited in amount, since to stay proceedings it must provide that appellant will satisfy any judgment that may be given against him on the appeal. (Rugh v. Soleim, 329.)

Justices of the Peace—Undertaking on Appeal—Waiver of Right as to Justification of Surety.

2. Where appellees on an appeal from a justice of the peace failed to except to the sufficiency of the surety or to require that he justify as provided by Section 2461, L. O. L., they waived their right in that respect, so that the filing of the transcript perfected the appeal as provided by Section 2463. (Rugh v. Soleim, 329.)

Justices of the Peace—Appeal—Undertaking—Justification of Sureties.

3. That a surety subscribed the affidavit of justification to an undertaking on appeal from a justice of the peace before the appeal was taken did not lessen his liability. (Rugh v. Soleim, 329.)

KNOWLEDGE.

See Principal and Agent 1.

LABOR.

See Highways, 2.

LANDLORD AND TENANT.

Landlord and Tenant—Action for Rent—Instructions—Surrender of Lease.

1. In an action to recover rent reserved under a lease, where the defense was acceptance of surrender of the lease by the lessor, instructions defining surrender by operation of law, and specifying numerous acts which would not alone warrant a finding of surrender, *held* fully and fairly to present that issue to the jury. (Warren v. Smith, 127.)

Landlord and Tenant—Injuries to Tenant—Sufficiency of Evidence.

2. In an action by a tenant injured by giving way of step in stairway to basement, evidence *held* to sustain a finding of negligence of the landlord, although he had employed a carpenter and the lumber had been put upon the premises to repair the steps. (Ashmun v. Nichols, 223.)

Landlord and Tenant—Failure of Landlord to Repair After Notice—Injury to Tenant—Landlord's Liability.

3. Where a landlord agreed to keep his premises in repair, the law fastened upon him such duty, and where he violated that duty

after notice of a dangerous condition of steps he is liable in damages for the tenant's personal injuries caused thereby, whether the injuries were directly contemplated in the contract and the action was purely contractual, or whether it was in tort for the landlord's negligence or whether it partakes of a double nature under the Code, depending upon both tort and contract. (Ashmun v. Nichols, 223.)

Landlord and Tenant—Agreement to Repair—Evidence.

4. In an action by a tenant against a landlord for personal injuries resulting from a defect in steps of which the landlord had notice, evidence *held* sufficient to support a jury's finding of an agreement by which the landlord was to repair whenever necessary to make the building safely habitable. (Ashmun v. Nichols, 223.)

Landlord and Tenant—Landlord's Agreement to Repair—Consideration.

5. Evidence *held* sufficient to show that the agreement of the landlord to make repairs necessary to make the building safely habitable, referred back to the original contract, and was not without consideration. (Ashmun v. Nichols, 223.)

Landlord and Tenant—Personal Injuries—Defective Steps—Notice—Contributory Negligence—Question for the Jury.

6. In action by a tenant against a landlord for personal injuries resulting from dangerous condition of steps, of which the landlord's agent had been notified, and which steps he had promised to immediately repair, requesting the tenant to use the steps with care, the question of contributory negligence was one for the jury. (Ashmun v. Nichols, 223.)

LAW OF THE CASE.

See Appeal and Error, 27.

LEADING QUESTIONS.

See Criminal Law, 23.

LEASE.

See Landlord and Tenant, 1.

LIABILITY.

See Officers, 2.

LIENS.

See Partition, 9, 10.

Deposit to Cover Liens.

See Banks and Banking, 1.

LIMITATION OF ACTIONS.

Limitation of Actions—Action for Fraud.

1. An action for fraudulent misrepresentations is governed by the two-year statute of limitations, subdivision 1, Section 8, L. O. L., as to injury to the person or rights of another not arising on contract and not especially enumerated, and not subdivision 4, Section 6,

L. O. L., as to actions for injuring personal property. (Schwedler v. First State Bank of Gresham, 33.)

Limitation of Actions—Suspension of Statute—Absence from State.

2. Where decedent, a resident of Michigan, in April, 1906, in that state, borrowed money from plaintiff, also a resident of Michigan, and plaintiff in August, 1909, demanded payment of the debt in Iowa, and a partial payment was made, and thereafter deceased removed to Oregon in April, 1910, where she resided until her death in September, 1915, plaintiff was not relieved from the effect of the statute of limitations by Section 16, L. O. L., relating to the suspension of the statute by absence from state. (In re Wemple's Estate, 41.)

Limitation of Actions—Checks.

3. Where a check was delivered and accepted in the city where the drawee bank was situated, the statute of limitations started to run at the close of the next business day in favor of the drawer of the check, although check was not presented to drawee bank until later, despite Section 6019, L. O. L., providing that drawer of check will be discharged from liability to the extent of loss occasioned by not presenting the check within reasonable time. (Colwell v. Colwell, 103.)

MANDAMUS.

Mandamus—Ministerial Duties.

1. Since Article IV, Sections 1, 1a, of the Constitution, do not permit a referendum upon a House Joint Resolution, the attorney general cannot be compelled under Section 3475, L. O. L., as amended by Laws of 1917, page 230, to provide a ballot title for petitions demanding a referendum of such resolution on the theory that such act is ministerial. (Herbring v. Brown, 176.)

Mandamus—Jurisdiction—Original Proceedings in Supreme Court—Scope of Relief.

2. On an original proceeding in *mandamus* in the Supreme Court, the court will decide all matters of general public interest and importance which the petition asks and which are argued in the briefs, not personal to the petitioner, and which, until decided, will seriously affect and unsettle the administration of the affairs of the state, though a decision as to such matter might be *dicta* as far as the parties involved are concerned. (Olcott, Gov., v. Hoff, St. Treas., 462.)

MARKET VALUE.

Machinery Destroyed by Fire.
See Evidence, 4.

MASTER AND SERVANT.

Master and Servant — Injury to Employee — Contributory Negligence—Sufficiency of Evidence.

1. In warehouse employee's action for injuries from spike in box-car door placed alongside of warehouse, at foot of steps, with spike protruding toward steps, involving question of whether employee was contributorily negligent in failing to avoid the door, evidence *held* to sustain verdict for employee. (Guntley v. Northern Pac. Terminal Co., 368.)

MAXIMS.

See Equity, 2.

MEASURE OF DAMAGES.

See Municipal Corporations, 19.

MEMORANDUM.

See Brokers, 2.

MENTAL CAPACITY.

See Wills, 14, 19.

MENTAL IMPAIRMENT.

See Wills, 26.

MINISTERIAL DUTIES.

See Mandamus, 1.

MISREPRESENTATIONS.

See Mortgages, 1.

MISTAKE.

See Execution, 2.
See Partnership, 1.

MODIFICATION.

See Partition, 5.

MORTGAGES.

Mortgages—Sale of Land—Representations—Means of Knowledge.

1. Where defendants, before making a contract for land, had received and relied upon favorable statements of their friend, this amounted to making an independent investigation, and where the means of knowledge were at hand for defendants' inspection during a period of three years between the original contract and the new contract embodying the note and mortgage sought to be foreclosed, defendants are not entitled to relief on the ground of fraudulent representations. (Tokay Heights Development Co. v. Hull, 159.)

Mortgages—Nature of Mortgagee's Right.

2. A mortgagee has no estate or title to realty, but only a lien which is enforceable by foreclosure of his mortgage. (Ukase Inv. Co. v. Smith, 337.)

Mortgage Lien.

See Partition, 10.

MOTIONS.

Motions—Vacating Order—Subsequent Term.

1. Where the court corrected *nunc pro tunc* an inadvertently erroneous return of published notice and so validated the default decree, it was without power to vacate it at a term subsequent to that in which the order was made. (Wade v. Wade, 642.)

MUNICIPAL CORPORATIONS.

Municipal Corporations—Sewers—Assessment—Benefit—Necessity.

1. Land which is not, and cannot be, drained by a sewer cannot be assessed therefor. (Duniway v. Cellars-Murton Co., 113.)

Municipal Corporations—Sewers—Assessments.

2. Under Portland City Charter, Section 389, a property owner cannot be assessed for a sewer unless he receives a special benefit therefrom. (Duniway v. Cellars-Murton Co., 113.)

Municipal Corporations—Sewers.

3. Under Portland City Charter, Section 389, an assessment for a sewer was void, where sewer was laid through private land of another, and land owner could not use it without being a trespasser. (Duniway v. Cellars-Murton Co., 113.)

Municipal Corporations—Improvements—Assessments—Sale—Right of Purchaser.

4. Purchaser at sale for street assessment, in absence of fraud, is governed by rule of *caveat emptor*, and after purchase, if it transpires that assessment is void, such purchaser obtains no title to or equity in land purchased. (Duniway v. Cellars-Murton Co., 113.)

Municipal Corporations—Streets—Suit by Property Owner—Burden of Proof.

5. Defendant city having denied plaintiff's allegations, *held*, that the burden of proof was on plaintiff property owner to establish that there was a public road or highway running through defendant city between certain blocks as shown on the recorded plat of the city, that the portion of the road within the city limits was known as Nursery Street, that plaintiff's property formed the north line of such road, and that what was within the city known as Nursery Street was in fact a county road. (Burch v. City of Amity, 152.)

Municipal Corporations—Streets—Identity With County Road—Sufficiency of Evidence.

6. In suit by a property owner against the city to prevent enforcement against the property of a lien for straightening the line of the street on which it abutted, evidence *held* insufficient to show the location of the old county road which plaintiff alleged was coterminous with the street in the city. (Burch v. City of Amity, 153.)

Municipal Corporations—Detectives—Complaint Against Surety—Statement of Necessity for Undertaking.

7. Complaint against city detectives and their surety for death of a third person from an accidental shooting as the detectives were recapturing an escaped prisoner must properly plead the legal necessity for the surety's undertaking described. (Askay v. Maloney, 566.)

Municipal Corporations—Detectives—Sureties—Collateral Responsibility—"Reimburse."

8. Where undertaking of surety company was to "reimburse" a city for any loss sustained by reason of failure faithfully to discharge their duties of city detectives named in attached schedule, responsi-

bility of surety was not concurrent, but collateral and successive, while that of detectives was primary; "reimburse" meaning to replace as equivalent for what has been taken, lost or expended, to refund, pay back or restore, indicating a secondary liability. (Askay v. Maloney, 566.)

Municipal Corporations—Detectives—Escape of Prisoner—Right to Shoot.

9. Under Sections 1760, 1909, L. O. L., city detectives, who had properly arrested without warrant one who had stolen a watch, were in the proper performance of their duty when they shot at the thief on his escape to prevent his getting away. (Askay v. Maloney, 566.)

Municipal Corporations—Detectives—Action in Bond—Pleading.

10. Complaint against city detectives and their surety that the detectives "carelessly and negligently, and without care or caution, disregarding the fact that said street intersection was a place where passengers and people were likely to be," shot at a thief to prevent his escape, properly charged negligence; the adverbs being a proper component of the allegation. (Askay v. Maloney, 566.)

Municipal Corporations — City Detectives — Negligence — Action on Bond—Burden of Proof.

11. On complaint against city detectives and their surety for having carelessly and negligently, disregarding character of street intersection as place where people were likely to be, shot plaintiff's decedent in attempt to recapture escaped thief, it was incumbent on plaintiff to prove occurrence of mishap, and alleged negligence of detectives which brought it about. (Askay v. Maloney, 566.)

Municipal Corporations—City Detectives—Duty of Care in Retaking Thief.

12. City detectives, in retaking in the street a thief who had escaped from their custody, were under duty to act with reasonable prudence to avoid injury to innocent persons, and should have used more caution in firing upon the thief with pistols than if merely grappling with him. (Askay v. Maloney, 566.)

Municipal Corporations—City Detectives—Negligence in Retaking Thief—Question for Jury.

13. Whether city detectives under all circumstances were negligent in shooting in street at thief escaped from their custody, thus accidentally killing plaintiff's decedent, *held* a question for the jury, in action against such detectives and their surety. (Askay v. Maloney, 566.)

Municipal Corporations—Improvements—Sewer Contract—Acceptance of Work—Waiver of Defects.

14. Where sewer contract expressly stated that engineer or inspector was not authorized to accept or approve work not done according to the contract, and reserved to the city alone the power to accept and approve work, city's acceptance and payment of contract price, without knowledge of defects not discoverable by an ordinary inspection, will not be construed a waiver or an estoppel to claim damages for such defects upon discovery thereof. (Seaside, City of, v. Randles, 650.)

Municipal Corporations—Improvements—Acceptance of Work—Prima Facie Evidence.

15. The acceptance of work by municipality is only *prima facie* evidence that the work has been done in substantial compliance with the terms of the contract. (Seaside, City of, v. Randles, 650.)

Municipal Corporations—Sewer Contract—Authority of Inspector—Acceptance of Work.

16. Where sewer contract expressly stipulated that inspector or engineer was without authority to accept or reject the work when not done according to the contract, contractor had no right to suppose that the city engineer or inspector was authorized to permit any deviation from the contract. (Seaside, City of, v. Randles, 650.)

Municipal Corporations—Sewer Contract—Breach by Contractor—Rights of City.

17. That city did not see fit to reconstruct sewer in precisely the same manner and according to the same plans and specifications under provision in contract giving it the right to so do upon contractor's breach did not affect the right of the city to recover damages for breach by contractor. (Seaside, City of, v. Randles, 650.)

Municipal Corporations—Sewer Contract—Payment by City—Release of Surety.

18. Payment by city for work accepted by it under sewer contract, under the honest belief that work was done in the manner required by the contract, did not release the surety. (Seaside, City of, v. Randles, 650.)

Municipal Corporations—Sewer Contract—Breach by Contractor—Measure of Damages.

19. On sewer contractor's failure to construct sewer according to plans and specifications, the city's measure of damages is reasonable cost and expense of procuring the work and labor to be done and furnishing the necessary material in order to make the sewer system conform to the contract. (Seaside, City of, v. Randles, 650.)

Municipal Corporations—Sewer Contract—Breach by Contractor—City's Right of Action.

20. On sewer contractor's failure to construct sewer system according to the contract plans and specifications, city had the right to prove its damages without waiting for the sewer system to be reconstructed. (Seaside, City of, v. Randles, 650.)

Municipal Corporations—Sewer Contract—Inspection of Work—Waiver.

21. That work on a sewer contract was performed in the absence of city engineer or inspector in violation of a contract, without objection by either inspector or engineer, was not a waiver by city of defects in the work, although the engineer or inspector knew work was being imperfectly done, where contract provided that engineer and inspector should not have authority to accept or reject work not performed according to the contract. (Seaside, City of, v. Randles, 650.)

Municipal Corporations—Sewer Contract—Breach of Contract—Action for Damages—Negligence of City Engineer or Inspector.

22. In city's action against sewer contractor for failure to construct sewer according to contract, where contractor denied that work was not constructed according to contract, the negligence of city engineer or inspector in examining and inspecting work was not material, the issue being whether or not work was done in accordance with contract plans and specifications. (Seaside, City of, v. Randles, 650.)

Municipal Corporations—Breach of Sewer Contract—Action for Damages—Burden of Proof.

23. City suing sewer contractor for failure to construct sewer according to contract plans and specifications has burden of proving that contractor failed to perform the requirements of contract specifically as mentioned in the complaint. (Seaside, City of, v. Randles, 650.)

Municipal Corporations—Sewer Contract—Action for Breach—Defenses.

24. In city's action against sewer contractor for failure to construct sewer according to the contract, it was no defense that the plans and specifications were defective, and that sewer, if constructed in accordance therewith, would have been worthless. (Seaside, City of, v. Randles, 650.)

Municipal Corporations—Action on Sewer Contract—Admissibility of Evidence.

25. In city's action against sewer contractor for failure to construct sewer according to contract, where contract expressly stipulated that city engineer had no authority to release contractor from a necessary and important requirement of the contract, evidence that engineer had instructed contractor's foreman to deviate from plans and specifications was inadmissible. (Seaside, City of, v. Randles, 650.)

Municipal Corporations—Action on Sewer Contract—Instructions.

26. In city's action against sewer contractor for failure to construct sewer according to plans and specifications, where contract required contractor to make joints tight and to fill every part of the joint with mortar where required, or oakum where required, instruction that it was contractor's duty to make a "tight joint" in each of the sewer joints, with cement mortar of the required mixture, was proper. (Seaside, City of, v. Randles, 650.)

MUTUAL AGREEMENT.

Acquiescence as to Boundary Lines.

See Boundaries, 1, 2.

NEGLIGENCE.

Negligence—Fires—Requirements of Ordinances.

1. Where fire which burned plaintiff's property was kindled on defendant's premises without the permit required by ordinance, an instruction that there was no evidence showing a violation of any

ordinance, was properly refused. (Northwest Door Co. v. Lewis Inv. Co., 186.)

Negligence—Fires—Violation of Ordinance—Negligence Per Se.

2. Where fire which was communicated to and destroyed plaintiff's property was kindled on defendant's premises without the permit required by ordinance, an instruction that where an act is done in violation of an ordinance, the law regards the act as negligently done was proper. (Northwest Door Co. v. Lewis Inv. Co., 186.)

Negligence—Fires—Evidence—Admissibility.

3. Where defendant's participation in burning debris from a former fire on its premises, resulting in the destruction of plaintiff's property, was in issue, evidence that defendant made claim against insurance companies for estimated cost of removing debris was admissible; it appearing that defendant's property was occupied by others at the time it was burned. (Northwest Door Co. v. Lewis Inv. Co., 186.)

Negligence—Fires—Evidence—Admissibility.

4. Evidence as to finding fire on defendant's premises two days after plaintiff's property was destroyed by fire communicated from defendant's premises is properly admitted. (Northwest Door Co. v. Lewis Inv. Co., 186.)

Negligence—Injuries from Plaintiff's Subsequent Acts—Pleading and Proof.

5. If one injured by negligence of another attempts to recover for suffering resulting from his own subsequent act rather than the original accident and presents evidence of his subsequent suffering, defendant, without any pleading and as a matter of negation, may prove that part or all of the suffering resulted from the second injury. (Ashmun v. Nichols, 223.)

See Innkeepers, 3.
See Municipal Corporations, 11, 13, 22.
See Parties, 1.

NEGLIGENCE PER SE.

See Negligence, 2.

NEW TRIAL.

New Trial—Grounds—Instructions.

1. Where, in the hurry of a trial, a mistake has been made, which might have had an influence upon the verdict, the mistake should be corrected in lower court by granting of a new trial. (Rogers v. Wills, 16.)

NONSUIT.

See Dismissal and Nonsuit.

NOTICE.

See Appeal and Error, 15, 16, 17.
See Attorney and Client, 1.
See Evidence, 1.
See Landlord and Tenant, 6.
See Partition, 2.

Service of Notice of Appeal by Error.
See Appeal and Error, 16.

Failure of Landlord to Repair After Notice.
See Landlord and Tenant, 3–5.

NUNC PRO TUNC.

Amendment of Return.
See Divorce, 3–5.
See Process, 1.

OBJECTIONS.

See Appeal and Error, 1, 13, 20.
See Criminal Law, 16, 17.

OFFICERS.

Officers—Requirement of Bond—Signature.

1. Though the requirement that an official "give a bond" does not necessarily mean that he must sign it, or that his signature is essential to its validity, unless he does sign it he is not directly liable upon it as a matter of contract. (Askay v. Maloney, 566.)

Officers—Official Undertaking—Liability With Surety.

2. An officer, on the official undertaking or bond executed by him, may be sued jointly with his surety for damages resulting from misconduct in office, if the stipulations of the instrument cover the situation involved. (Askay v. Maloney, 566.)

Right to Arrest Without Warrant.
See Arrest, 1.

OLD AGE.

See Wills, 26.

ORDINANCES.

See Negligence, 1, 2.

OREGON CASES.

Applied, Approved, Cited, Distinguished, Followed and Overruled in this Volume.
See Table in Front of this Volume.

OREGON CONSTITUTION.

Cited and Construed in this Volume.
See Table in Front of this Volume.

OREGON STATUTES.

Cited and Construed in this Volume.
See Table in Front of this Volume.

PAROL CONTRACT.

See Specific Performance, 1.

PAROL EVIDENCE.

See Trusts, 2.
See Evidence, 10.

PAROL TRUST.

See Trusts, 3.

PARTIES.

Parties—Fire Insurance—Action Against Negligent Third Person.

1. Where insurance does not equal loss alleged from destruction of property by fire through the negligence of a third person, it is the duty of the company and insured to join as parties in action against the third person. (Northwest Door Co. v. Lewis Inv. Co., 186.)

PARTITION.

Partition—Referee—Competency.

1. A defendant in partition suit, alleged to have no right, title, interest, claim or lien to property, or any part thereof, and who made default, was without interest, and his appointment as referee to make partition *held* not erroneous. (Meyers v. Eichler, 1.)

Partition—Referees' Oath—Notice of Meeting.

2. Objection urged for the first time on appeal that referees appointed to make partition were not sworn, and that parties were not notified of their meeting, may be dismissed on the ground that the Code does not require any oath or notice of meeting; there being no oath required even under the general provisions of Section 160, L. O. L., et seq. (Meyers v. Eichler, 1.)

Partition—Unfair Division—Showing—Sufficiency.

3. Majority report of referees *held* not subject to objection that it did not provide for a fair division of the premises sought to be partitioned. (Meyers v. Eichler, 1.)

Partition — Decision of Referees—Setting Aside—Displeasure of a Party.

4. Decision of majority of referees appointed to make partition must stand as against the mere displeasure of one of the parties. (Meyers v. Eichler, 1.)

Partition—Modifying Report of Referees—Discretion.

5. Circuit Court did not abuse its discretion in declining to adopt defendant's offer to exchange land allotted to him for that allotted to plaintiff and modifying report of referees accordingly, it being contended by defendant's counsel that such change should require plaintiff to assume two thirds of mortgage indebtedness upon whole tract, whereas she owes but one third of it. (Meyers v. Eichler, 1.)

Partition—Expenses of Suit—Apportionment.

6. Where costs of partition suit were apportioned in proportion to respective interests of plaintiff and defendant in accordance with Sec-

tion 483, L. O. L., defendant has no cause to complain of apportionment. (Meyers v. Eichler, 1.)

Partition—Nature of Proceeding.

7. A suit for the partition of real property is a statutory proceeding. (Jacobs v. Jacobs, 255.)

Partition—Nature of Proceeding—Issues—Incidental Relief—Rents and Proceeds.

8. The primary purpose of Sections 435, 436, 440, 441, L. O. L., relating to partition, is to ascertain and determine the title to real property only; and, while it may be true that under proper allegations the question of rentals and proceeds would become an incident to a partition suit and could be settled by a decree, in the absence of proper allegations, such questions could not be adjudicated. (Jacobs v. Jacobs, 255.)

Partition—Persons Who can Sue—Lienholders.

9. Under Section 435, L. O. L., providing that the only persons who can sue in partition are those who hold as tenants in common, have an estate of inheritance, or for life or years, or a vested remainder or reversion, a mere lienholder cannot institute such a suit. (Ukase Inv. Co. v. Smith, 337.)

Partition — Relief Incidental to Partition — Encumbrances on Property—Mortgage Lien.

10. Under Sections 422–483, L. O. L., governing the partition of real property, reading together Section 437, making the lien of a creditor or an undivided portion a lien upon the severed portion thereafter, and Section 461, requiring notice to be given that the estate is sold subject to a lien, all that can be done in a suit of partition concerning a mortgage lien is to attach it to the partitioned portion of the property to which it belongs. (Ukase Inv. Co. v. Smith, 337.)

PARTNERSHIP.

Partnership—Accounting—Mistake in Entries of Deceased—Burden of Proof.

1. Plaintiff, administratrix of deceased partner, has the burden of showing mistakes in entries in the handwriting of her deceased husband in partnership records that he kept. (Graham v. Graham, 6.)

PAYMENT.

Effect of Payment Under Protest.

See Appeal and Error, 5.

PERSONAL INJURY.

See Ashmun v. Nichols, 223.
See Guntley v. Northern Pac. Terminal Co., 368.

PHOTOGRAPHS.

See Evidence, 3.

PLEADING.

Pleading — Supplemental Pleading—Matters Occurring After Issue Joined.

1. In suit to quiet title, where purchaser at sale for street assessment was a defendant, assessment being void at time made by reason of sewer being laid through private property, subsequent proceedings by city for obtaining an extension of street where sewer was laid might form basis for a reassessment, but could not validate assessment made prior to suit; subsequent matter not being brought into suit by any supplemental pleading. (Duniway v. Cellars-Murton Co., 113.)

Pleading—Cure by Verdict.

2. If complaint in suit against county on claim arising out of contract contained terms sufficiently general to comprehend the essential fact of presentation of the claim to the county auditor, the failure to expressly aver the fact of presentation is cured by the verdict. (Bridges v. Multnomah County, 214.)

Pleading—Answer—Evidentiary Matter.

3. In suit to compel the application of municipal warrants to satisfaction of certain judgments, where answer of certain defendants alleged partnership with judgment debtor and interest in the warrants, the making of an order requiring such answer to be made more definite by setting forth nature, character, and amount of consideration or capital furnished by each partner was error; such details being merely evidentiary. (Neilson v. Title Guaranty & T. Co., 243.)

Pleading—Order Striking Out Answer—Failure to Make More Definite—Service of Order.

4. Where order required answer to be made more definite by amendment made within stipulated time from service of order upon defendants, it was error to strike answer from files upon defendants' failure to amend answer, where order was never served upon them. (Neilson v. Title Guaranty & T. Co., 243.)

Pleading—Answer—Amendment—Unintentional Denial.

5. In application to compel application of municipal warrants to satisfaction of certain judgments, where complaint alleged that certain defendants claimed an interest in the warrants, the court erroneously refused such defendants permission to amend their answer so as to admit such allegations instead of denying them; it being apparent that such denial was unintentional. (Neilson v. Title Guaranty & T. Co., 243.)

Pleading—Admission in Answer—Effect.

6. Where the complaint of plaintiff suing a lodging-house keeper for loss of goods alleged that at all times mentioned defendant was the keeper of a common inn or hotel, which was admitted in the answer, it may be accepted as established that defendant was keeping such a place. (McIntosh v. Schops, 307.)

Pleading — Conclusion of Law — Complaint Against Surety — Legal Necessity for Undertaking.

7. Complaint against police detectives and surety for death from accidental shooting of third person as detectives were recapturing es-

caped prisoner, which alleged that on a given date, "in accordance with the law covering such cases," the surety entered into a bond or undertaking, merely pleaded a conclusion of law as to legal necessity for undertaking, and was insufficient; Section 90, L. O. L., providing that reference to ordinance or enactment by its title and date of approval shall be sufficient, not having been complied with. (Askay v. Maloney, 566.)

Pleading—Election Between Tort and Contract—Right of Defendant.

8. City detectives and surety for them, sued for accidental shooting of third person by detectives while retaking escaped prisoner, had right to compel plaintiff to elect between two causes of action, one for tort, other on contract, stated in complaint, only liability of detectives as disclosed being for tort, while breach of contract alone could be attributed to surety. (Askay v. Maloney, 566.)

Pleading—Complaint—Sufficiency—Question Raised on Appeal.

9. Where defendant did not demur to a complaint in divorce, but went to trial upon a simple denial that accusations of infidelity were made, the complaint must be held sufficient as against objection urged upon appeal that it does not allege that the accusations were made by defendant with intent to wound plaintiff's feelings. (Railsback v. Railsback, 623.)

Pleading—Hypothetical Allegations.

10. An averment that a party would not have done a hypothetical act presents no issuable matter; for it cannot be proved or refuted. (Churchill v. Meade, 626.)

Pleading—Allegations—Conclusion—"Facts."

11. In action to set aside decree confirming execution sale upon ground of mistake, allegation that plaintiffs would not have bid so much if they had calculated correctly *held* a conclusion, and not statement of fact; "facts" being actualities and what have taken place, and not what might or might not have taken place. (Churchill v. Meade, 626.)

Pleading—Amendment of Complaint—Action on Sewer Contract.

12. In city's action against sewer contractor for failure to construct sewer according to the plans and specifications, where contractor denied that work had not been performed in accordance therewith, and where contract pleaded showed that city engineer had no authority to release contractor from an important requirement of the work, court properly refused contractor permission to amend complaint so as to allege that engineer had directed contractor's foreman to deviate from the plans and specifications. (Seaside, City of, v. Randles, 650.)

See Counties, 2.
See Fraud, 1.
See Fraudulent Conveyances, 1.
See Innkeepers, 3.
See Judgment, 1.
See Municipal Corporations, 7, 10.
See Negligence, 5.

PORTLAND, CHARTER OF.

See Askay v. Maloney, 563.
See Duniway v. Cellars-Murton Co., 113.

PRESUMPTIONS.

See Easements, 1.
See Wills, 6.

PRINCIPAL AND AGENT.

Principal and Agent—Delivery of Deed to Unauthorized Agent—Ratification—Knowledge.

1. That grantees, expecting grantors to execute deed, spoke of property as their own, did not ratify the action of grantors in secretly executing deed and without knowledge of grantees delivering it to real estate agent who negotiated transaction and was not authorized to accept deed. (Rogers v. Wills, 16.)

Principal and Agent—Authority to Compromise and Make Settlement.

2. An agreement between an electric light and power company's customer and her agent that the agent was to check up and audit customer's bills for light and power between certain dates, for which services the agent was to be paid 50 per cent of all money returned or credited to her account by reason of errors or overcharges, *held* to give the agent power to agree with the company as to the amount it should repay the customer on account of errors and overcharges and to include authority to make settlement. (Cash v. Portland Ry. L. & P. Co., 81.)

Principal and Agent—Misconduct of Agent—Violation of Instructions.

3. Principal is never charged with consequences of agent's misconduct in violating his instructions except for the protection of some third person who has been misled by a reliance on an ostensible authority of the agent. (Seaside, City of, v. Randles, 650.)

PRINCIPAL AND SURETY.

See Officers, 2.
See Pleading, 7.

PROBATE.

See Wills, 12.

PROCESS.

Process—Amendment of Return—Nunc Pro Tunc.

1. It being the service and not the return which authorized a default judgment, an order *nunc pro tunc* for the amendment of a return erroneously giving the date of the service of summons relates back to the date of the original summons. (Wade v. Wade, 642.)

PROPERTY RIGHTS.

Settlement of Property Rights.

See Divorce, 2.

PUBLIC LANDS.

See Easements, 5.

PUBLIC STREETS.

Implied Dedication of Street.

See Dedication, 2.

QUESTION FOR JURY.

See Appeal and Error, 18.
See Banks and Banking, 2, 3.
See Criminal Law, 14.
See Municipal Corporations, 13.

QUESTION FOR COURT.

See Bills and Notes, 1.
See Landlord and Tenant, 6.

QUIETING TITLE.

Quieting Title—Matters Occurring After Action Brought.

1. In action to quiet title, title is to be determined by conditions as they existed at time issues were made. (Duniway v. Cellars-Murton Co., 113.)

Quieting Title—Scope of Inquiry.

2. A special assessment levied for a municipal improvement may be questioned and tested in a suit to quiet title to real property assessed. (Duniway v. Cellars-Murton Co., 113.)

Quieting Title—Burden of Proof.

3. In suit to quiet title, burden was upon defendant, who purchased the land at a sale for street assessment, to allege and prove his interest in the property. (Duniway v. Cellars-Murton Co., 113.)

RAPE.

See Criminal Law, 1.

RATIFICATION.

See Principal and Agent, 1.

RECORDS.

Correction of Records During Term.

See Courts, 5.
See Divorce, 4, 5.

REDELIVERY BOND.

See Replevin, 1.

REFEREE.

See Partition, 1–5.

REFERENDUM.

See Statutes, 1, 2, 3.

REFORMATION OF INSTRUMENTS.

Reformation of Instruments—Nature of Remedy—"Reformation."

1. "Reformation" contemplates a continuance of the contractual relations upon what both parties really intended should be the stipulation. (Churchill v. Meade, 626.)

RENTS AND PROCEEDS.

See Partition, 8.

REPLEVIN.

Replevin—Defendant's Redelivery Bond—Construction—Costs.

1. Redelivery bond of defendant in replevin action conditioned "for the payment to said plaintiff of any such sum as may, for any cause, be recovered against said defendant," *held* to obligate sureties to pay costs taxed against defendant in the trial court and also on his appeal. (Mishler v. Edmunson, 347.)

Replevin—Redelivery Bond—Release of Surety—Execution of Supersedeas Bond.

2. The execution of a *supersedeas* bond by defendant in replevin action on appeal from judgment for plaintiff does not operate to release sureties upon his redelivery bond. (Mishler v. Edmunson, 347.)

RES ADJUDICATA.

See Judgment, 2.

REVERSIBLE ERROR.

See Criminal Law, 23, 27.

REVIEW.

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Unlawful Sale of Intoxicating Liquors.

See Criminal Law, 14, 15.
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See Municipal Corporations, 1–3.

SPECIFIC PERFORMANCE.

Specific Performance—Parol Contract—Satisfactory Proof.

1. Where the contract rests wholly in parol and the alleged promisor is dead, courts should demand clear and satisfactory proof of the terms of the agreement and its strict performance by the promisee. (Herr v. McAllister, 581.)

STARE DECISIS.

See Courts, 3, 4.

STATES.

States—Death of Governor—Succession.

1. Where the governor of Oregon is removed, dies, resigns or is unable to discharge the duties of his office, the secretary of state becomes governor in fact and is entitled to receive compensation as such, under Article V, Section 8 of the Constitution, notwithstanding Article III, Section 1, Article II, Section 10, of the Constitution, providing, among other things, that no person shall hold more than one lucrative office at the same time. (Olcott, Governor, v. Hoff, State Treasurer, 462.)

STATUTE OF FRAUDS.

See Brokers, 2–4, 5.
See Trusts, 2.

STATUTES.

Statutes—Referendum—Constitutional Provision—Applicability—Joint Resolution.

1. Neither House Joint Resolution No. 1, ratifying proposed "National Prohibition Amendment," nor any other resolution of the legislature, is subject to referendum by Article IV, Sections 1, 1a, of the Constitution, such sections applying only to proposed laws. (Herbring v. Brown, 176.)

Statutes—Initiative and Referendum—"Bill"—"Act"—"Joint Resolution."

2. To ascertain what is meant by the terms "bill" and "act" in Article IV, Sections 1, 1a, of the Constitution (amended), as to initiative and referendum, reference must be made to the sense in which the words were used before such amendments were passed, and, when reference is so made, it is found that the first term means a proposed law (Article IV, Section 1 [original], and Sections 18, 19; Article V, Section 15), while the second means a bill which has been enacted by the legislature into a law (Article IV, Sections 20, 21, 22, 28); a "joint resolution" being neither a bill nor an act. (Herbring v. Brown, 176.)

Statutes—Initiative and Referendum—Constitutional Provision—Construction.

3. The subject matter upon which the powers given by Article IV, Sections 1, 1a, of the Constitution, may be exercised, namely, initia-

tive laws, constitutional amendments, and acts of the legislature referred to the people, are referred to collectively as "measures" merely as a matter of convenience and not with intent to include other and different powers. (Herbring v. Brown, 176.)

See Limitation of Actions, 2.

STREETS.

See Municipal Corporations, 5.

Implied Dedication of Public Street.

See Dedication, 2.

Identity of With County Road.

See Municipal Corporations, 6.

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Approval of Work Done by Contractor.

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SUPPLEMENTAL PLEADINGS.

See Pleading, 1.

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TAXATION.

Taxation—Delinquent Taxes—Purchase and Sale by County—Title of Purchaser—Taxes Satisfied.

1. Under the statutory scheme for collection of delinquent taxes as embodied in Sections 3713, 3717, 3718, L. O. L., as amended by Laws of 1913, Chapter 184, purchaser at sale by county of land it had bought for taxes of one year, takes it discharged of all subsequent taxes, certificates of delinquency for which had been issued to the county, and subject only to taxes of the current year; that is, the year in which the sale is made. (Hager v. Clatsop County, 600.)

TECHNICAL ERROR.

When Appeal will be Affirmed Under Constitution.

See Criminal Law, 7.

TENDER.

See Brokers, 9.

TESTAMENTARY CAPACITY.

See Evidence, 5.
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TIME.

Failure to File Brief Within Time.
See Appeal and Error, 8.

Extension of Time for Filing Transcript.
See Appeal and Error, 15.

TORT.

Tort or Contract.
See Action, 1.

Election Between Tort and Contract.
See Pleading, 8.

TRANSCRIPT.

Extension of Time for Filing Transcript.
See Appeal and Error, 15.

TRIAL.

Trial—Instruction—Necessity—Action for Breach of Contract.

1. In action for breach of contract to convey, defended on ground that deed had been delivered, court's refusal to instruct that delivery, where in fact made, was not affected by the deed's again coming under control of grantors, was error, where there was evidence that deed which had never been recorded had again come into possession of grantors, since such evidence might lead jury to think the title had remained in grantors. (Rogers v. Wills, 16.)

Trial—Instruction—Necessity—Action for Breach of Contract.

2. Court's refusal to instruct that the delivery of the deed was not affected by the nonrecording of deed or by fact that it was being held by agent as security for payment of commission was for the same reason also error. (Rogers v. Wills, 16.)

Trial—Duty of Court—Instructions.

3. A recent amendment to the Constitution which inhibits the court from passing on the weight of testimony upon a motion for new trial imposes upon the trial court the duty of seeing that the law by which the jury shall measure the facts shall be accurately stated. (Rogers v. Wills, 16.)

Trial—Instructions—Exclusion of Issues.

4. Where a tenant claimed release from payment of the rent under a certain contract, and also by surrender by operation of law, an instruction that the burden was on the tenant to show release, and that he claimed release under the contract, was properly refused as depriving defendant of his other defenses. (Warren v. Smith, 127.)

Trial—Instruction—Evidence.

5. An instruction that plaintiffs could recover rent under a lease to a specified date was properly refused, where there was evidence from which the jury could infer a surrender of the lease by operation of law at an earlier date. (Warren v. Smith, 127.)

Trial—Instruction Covered by Charge—Refusal.

6. Requested instruction with reference to defendant being required to use only ordinary care and diligence to prevent fire started on its premises by third person from spreading to other premises *held* sufficiently covered by a general charge. (Northwest Door Co. v. Lewis Inv. Co., 186.)

Trial—Erroneous Instruction—Cured by Other Instruction.

7. Error in using the expression "approximate cause" in instruction that if kindling of fire by defendant on its premises was the approximate cause of communicating sparks of fire resulting in the destruction of insured's property to find for plaintiff was cured by general instruction, stating, among other things, that "proximate cause" is the principal cause and is an important matter in cases of this kind. (Northwest Door Co. v. Lewis Inv. Co., 186.)

Trial—Instruction—Judicial Intimation.

8. In action against defendant through whose negligence plaintiff insured's property was alleged to have been destroyed by fire started on defendant's premises, the words "having in view the probable danger of injury," at the end of each paragraph of an instruction defining negligence, *held* not a judicial intimation that there were dangers connected with the methods used by defendant in cleaning away debris from its property. (Northwest Door Co. v. Lewis Inv. Co., 186.)

Trial—Instructions Sufficiently Given—Refusal.

9. There was no error in refusing a requested instruction substantially covered by general instructions given. (Northwest Door Co. v. Lewis Inv. Co., 186.)

Trial—Reception of Evidence—Offer of Proof.

10. There was no error in sustaining an objection to a question, where there was no showing or offer as to what would have been the proof if the witness had been permitted to testify. (Ashmun v. Nichols, 223.)

Trial—Exclusion of Evidence—Necessity of Statements as to What Witness Would Answer.

11. Before a party can take advantage of an error in excluding evidence, he must state to the court what he expects the answer of the witness will be, so that the court may know whether the answer excluded would have been favorable to the party offering it. (Ashmun v. Nichols, 223.)

Trial—Instructions—Refusal of Instructions on Matters Covered by Others.

12. It is not error to refuse a requested instruction upon matters sufficiently covered by the general charge. (Ashmun v. Nichols, 223.)

Trial—Nonsuit—Waiver of Variance.

13. Where a cause was tried and jury was instructed upon a theory not justified by pleadings, defendant was not entitled to a judgment of nonsuit but only to a trial upon the issues as joined. (Multnomah County v. Standard Am. Dredging Co., 261.)

Trial—Setting Aside Verdict—Evidence.

14. A verdict must stand if there is any evidence to sustain it. (Sturtevant v. Sturtevant, 269.)

Trial—Ruling as to Duty to Produce Evidence—Statement as to Shifting of Burden.

15. Court cannot tell jury that party holding affirmative of an issue has sustained burden of proof at any stage of the case, and that it then shifts. (Askay v. Maloney, 566.)

Trial—Instructions—Interference With Province of Jury.

16. In view of Sections 726, 810, 868, L. O. L., instructions as to shifting of burden of proof *held* erroneous as interfering with jury's province to act as exclusive judges of effect and value of evidence. (Askay v. Maloney, 566.)

Trial—Submission of Theory to Jury.

17. Where the contention of either party is alleged in the pleadings and sustained by evidence sufficient to go to jury, he has the right to have that theory submitted. (De Vol v. Citizens Bank, 606.)

See Criminal Law, 16, 17.

Trial Without a Jury.

See Appeal and Error, 21.

Trial of Cause De Novo.

See Courts, 2.

Failure to Try Case at Following Term as Grounds for Dismissal.

See Criminal Law, 1–4.

TRUSTS.

Trusts—Trust in Land—Evidence.

1. In an action to have a trust declared in land deeded by a parent of the parties to defendant, evidence *held* sufficient to warrant a finding that the parent and the defendant had agreed that defendant should hold the title as a trustee for the benefit of all his children. (Hirtzel v. Drake, 71.)

Trusts—Parol Evidence—Statute of Frauds.

2. Where a sister holding realty in trust for her brother on his order and request signed deed to a buyer in recognition of the parol trust, her testimony that she had held the property in trust for her brother was not inadmissible, as in violation of the statute of frauds, in the brother's action to recover his deposit made to cover paving liens. (De Vol v. Citizens Bank, 606.)

Trusts—Parol Trust—Sale of Property—Proceeds — Right of Beneficiary.

3. Where a sister held realty deeded to her by her brother under parol trust for his benefit, and joined in execution of his deed to a buyer, the purchase price became the brother's property as much as though he had previously held the legal title. (De Vol v. Citizens Bank, 606.)

See Attorney and Client, 2.

UNDERTAKING.

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WILLS.

Wills—Validity—Partial Intestacy.

1. It is not essential to the validity of a will that it should dispose of all of the property of the deceased, but a single bequest, however small, would be valid if no other property were disposed of. (Sullivan v. Murphy, 52.)

Wills—Validity—Revocation.

2. A will would be entirely valid if it effected nothing more than the revocation of a former will. (Sullivan v. Murphy, 52.)

Wills—Burden of Proof—Testamentary Capacity.

3. The burden of proving testamentary capacity rests in the first instance upon the proponent. (In re Dale's Estate, 57.)

Wills—Testamentary Capacity—Evidence.

4. Evidence *held* to show that testatrix, 87 years old, was mentally capable of making will. (In re Dale's Estate, 57.)

Wills—Validity—Undue Influence.

5. Daughter, contesting mother's will on the ground that beneficiary and her husband unduly influenced mother by slanderous statements, has burden of proof, which may shift upon proof of confidential relationship and other suspicious circumstances, such as activity of the latter in preparation of will. (In re Dale's Estate, 57.)

Wills—Undue Influence—Presumption.

6. Undue influence is never presumed. (In re Dale's Estate, 57.)

Wills—Undue Influence—Circumstantial Evidence.

7. Circumstantial evidence is often admitted to prove undue influence. (In re Dale's Estate, 57.)

Wills—Undue Influence—Confidential Relations.

8. Confidential relations between testatrix and person charged with having exerted undue influence, though not in itself sufficient to create a presumption of undue influence, is a circumstance which taken in connection with other suspicious circumstances, may justify such an inference of undue influence as to shift burden of proof upon beneficiary. (In re Dale's Estate, 57.)

Wills—Undue Influence—Activity in Preparation of Will.

9. Activity in preparation of will by one who is charged with having exerted undue influence is a suspicious circumstance, which, considered in connection with the fact of confidential relationship between testatrix and such persons, may justify such an inference of undue influence as to shift burden of proof to beneficiary to disprove such influence. (In re Dale's Estate, 57.)

Wills—Will Contest—Evidence.

10. In daughter's contest of mother's will on ground that mother was unduly influenced to disinherit daughter, evidence of conduct of daughter's husband, while daughter and husband were visiting testatrix, was competent to show testatrix's antipathy toward him. (In re Dale's Estate, 57.)

Wills—Undue Influence—Sufficiency of Evidence.

11. In daughter's contest of mother's will, on ground that mother had been unduly influenced, by slanderous statements, to disinherit daughter, evidence *held* insufficient to show undue influence. (In re Dale's Estate, 57.)

Wills—Probate—Burden of Proof.

12. Where a will probated in common form has been attacked by direct proceedings, proponents must re-probate the will by original proof, as if no probate had been made, the burden of proof being upon proponents. (Sturtevant v. Sturtevant, 269.)

Wills—Undue Influence—Burden of Proof.

13. The burden of establishing that a will has been executed because of undue influence is upon the party alleging it. (Sturtevant v. Sturtevant, 269.)

Wills—Mental Capacity—"Delusion."

14. An alleged delusion that an excluded son had buried a large sum of money which he had embezzled from testator was not shown where there was some evidence to support testator's belief, "delusion" being a conception originating spontaneously, without evidence to support it, and one that can be accounted for on no reasonable hypothesis. (Sturtevant v. Sturtevant, 269.)

Wills—Delusions—Evidence—Sufficiency.

15. Where a will was contested on the ground that testator labored under a delusion that contestant had buried a large sum of money which he had embezzled from testator, evidence *held*, not sufficient to show the existence of such delusion. (Sturtevant v. Sturtevant, 269.)

Wills—Testamentary Capacity—Persons Under Guardianship.

16. A person under guardianship does not on that account lose his right to make testamentary disposition of his estate if he retains sufficient mental capacity to execute a will. (Sturtevant v. Sturtevant, 269.)

Wills—Contests—Evidence—Relevancy.

17. Where a will is contested on the ground of want of capacity, contestant alleging that testator labored under a delusion that his money had been embezzled by a son, evidence as to the reputation for honesty of such son was irrelevant. (Sturtevant v. Sturtevant, 269.)

Wills—Testamentary Capacity—Evidence—Sufficiency.

18. Where a will is contested on the ground of want of capacity and undue influence, positive testimony of the subscribing witnesses, showing a testamentary capacity, overcomes opinion evidence by other witnesses, showing eccentricities of actions, writings, and speech. (Sturtevant v. Sturtevant, 269.)

Wills—Mental Capacity—Evidence—Sufficiency.

19. Where a will was contested on the ground of mental incapacity, evidence *held* to show that testator, although he was old and

infirm and not so bright as formerly, retained sufficient mentality to make his will. (Sturtevant v. Sturtevant, 269.)

Wills—Contests—Undue Influence—Evidence.

20. In a suit by testator's son to set aside a will which failed to make provision for him, and made another son the chief beneficiary, evidence *held* not to sustain a finding of undue influence. (Sturtevant v. Sturtevant, 269.)

Wills—Testamentary Capacity.

21. One has sufficient testamentary capacity to make a will if he knows what he is doing and to whom he is giving his property, though he may be incapable of making a contract or managing his estate. (Sturtevant v. Sturtevant, 269.)

Wills—Testamentary Capacity—Delusions.

22. The mere fact that testator had delusions upon some subject does not show want of testamentary capacity, if these delusions did not affect his mind in making his bequests. (Sturtevant v. Sturtevant, 269.)

Wills—Testamentary Capacity—"Delusion."

23. A "delusion" is a fixed belief in a proposition which has no foundation in evidence and which is so extravagant that a reasonable man would not adhere to it. (Sturtevant v. Sturtevant, 269.)

Wills—Validity.

24. Testator has perfect legal right to dispose of his estate as he chooses. (Sturtevant v. Sturtevant, 269.)

Wills—"Undue Influence."

25. Kind treatment and even reasonable solicitation do not constitute "undue influence." (Sturtevant v. Sturtevant, 269.)

Wills—Testamentary Capacity—Old Age—Mental Impairment.

26. One who retains sufficient independent mentality to know what he wishes to do with his property and to know that will expresses his desires may make will, though suffering from mental impairment as result of old age and disease. (Sturtevant v. Sturtevant, 269.)

Wills—Contract by Testator to Convey in Consideration of Services—Evidence.

27. Evidence *held* insufficient to establish an oral contract by which testator promised to convey property to plaintiff in consideration of services in keeping house for him until his death; it appearing that she was fully compensated for her services. (Herr v. McAllister, 581.)

WITNESSES.

Witnesses—Fees—Attendance Outside of County.

1. Since, under Section 3145, L. O. L., a witness in Multnomah County is allowed mileage of only five cents per mile, a witness summoned to attend from another county, whose residence is more than 100 miles from the place of trial, is entitled to the double mileage

given by Section 818, calculated on the basis of five cents only. (Ogilvie v. Stackland, 352.)

Witnesses—Impeachment—Evidence of Crimes.

2. In prosecution for the unlawful sale of liquor, evidence that a witness who testified to having purchased liquor from defendant had himself been, at one time, a bootlegger, was inadmissible, where it was not claimed that witness had been convicted of illegal sales of intoxicating liquor. (State v. Newlin, 589.)

Witnesses—Cross-examination—Motive and Interest.

3. In prosecution for unlawful sale of liquor, where detective had testified to buying liquor from defendant, it was not improper for court to refuse to permit defendant to continue cross-examining detective as to his motives and interest in the case, after his interest in case had been fully disclosed by cross-examination. (State v. Newlin, 589.)

Witnesses—Showing Inconsistent Statement—Party Introducing Witness.

4. Under Section 861, L. O. L., authorizing the party producing a witness to show he had made statements inconsistent with his testimony, as provided in Section 864, the state could call the attention of its witness to a prior inconsistent statement, together with the circumstances of time and place and persons present, to refresh his memory and induce him to correct his testimony or explain the inconsistency; the things to be avoided being showing his bad character, and introducing as substantive evidence unsworn or prior statements of witness. (State v. Merlo, 678.)

Witnesses—Impeachment of Character of Own Witness.

5. In view of Section 861, L. O. L., a party who produces a witness of bad character cannot show the bad character of that witness and thus relieve himself from the injurious effects of any unfavorable testimony given by such witness. (State v. Merlo, 678.)

Witnesses—Impeachment—Inconsistent Statements.

6. Under Section 861, L. O. L., if the witness fails to testify as he was expected to do, but does not give testimony prejudicial to the party calling him, then the party producing the witness cannot impeach him by showing prior inconsistent statements. (State v. Merlo, 678.)

Witnesses—Impeachment of Own Witness—Inconsistent Statements.

7. Under Section 861, L. O. L., where a presumably truthful person makes a statement and afterward as a witness makes an inconsistent statement to the surprise and prejudice of the party calling him, then the party calling the witness is not at fault, and should be permitted to repair the damage. (State v. Merlo, 678.)

Witnesses—Impeachment—Inconsistent Statements.

8. In prosecution of wife for killing her husband, testimony of a state witness, who had stated that defendant and deceased quarreled, that he did not know who started the quarrels was not affirmatively prejudicial to the state, and such as to authorize the state, under Sec-

tion 861, L. O. L., in impeaching the witness by evidence of prior inconsistent statements. (State v. Merlo, 678.)

Witnesses—Quarrelsome Disposition of Accused.

9. In prosecution for murder, where the witness in question had given testimony on direct examination, from which it could be argued that the victim, defendant's husband, was either alone responsible for quarrels with defendant or an aggressive participant, the district attorney was well within the limits of Section 860, L. O. L., when he asked defendant's witness on cross-examination whether the quarrels began when defendant discovered that the husband did not have "lots of money. (State v. Merlo, 678.)

Witnesses—Impeachment—Immaterial Matters.

10. The general rule is that when a cross-examination elicits from a witness matter that is immaterial or irrelevant the party conducting the cross-examination is concluded as to such matter, and cannot impeach the credibility of the witness by showing contradictory statements. (State v. Merlo, 678.)

See Appeal and Error, 14.
See Criminal Law, 2, 20, 21.
See Trial, 11.

Testimony of Witness of Adverse Party.

See Estoppel, 1.

Intentions of Witness.

See Evidence, 12.

WORDS AND PHRASES.

Words and Phrases—"Refund."

1. "Refund" means to give back, to repay, to restore, to supply again with funds, to reimburse, to return in payment or compensation for what has been taken, or the repayment or return of money. (Cash v. Portland Ry. L. & P. Co., 81.)

"Act"—See Herbring v. Brown, 176.
"Bill"—See Herbring v. Brown, 176.
"Boarding-house keeper"—See McIntosh v. Schops, 307.
"Decree by confession"—See Graham v. Graham, 6.
"Delusion"—See Sturtevant v. Sturtevant, 269.
"Facts"—See Churchill v. Meade, 626.
"Guest"—See McIntosh v. Schops, 307.
"Joint resolution"—See Herbring v. Brown, 176.
"Labor"—See Multnomah County v. United States Fidelity & Guar. Co., 146.
"Lodger"—See McIntosh v. Schops, 307.
"Lodging-house keeper"—See McIntosh v. Schops, 307.
"Person injured"—See Cash v. Portland Ry. L. & P. Co., 81.
"Reformation"—See Churchill v. Meade, 626.
"Refund"—See Cash v. Portland Ry. L. & P. Co., 81.
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WRIT OF REVIEW.

See Certiorari, 1.